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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE TREASURY,
FINANCIAL MANAGEMENT SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), which arose directly under the Freedom of Information Act, requires barring disclosure to federal unions under the federal sector labor relations law of the names and home addresses of employees represented by the unions because such disclosure does not inform the public of what the government is up to, even though such disclosure promotes the public interest by facilitating the federal sector collective bargaining process.

PARTIES TO THE PROCEEDING

The proceedings in the court below consisted of six consolidated cases involving review of four decisions of the Federal Labor Relations Authority. The petitioner before this Court, the Federal Labor Relations Authority, was petitioner/cross-respondent in several of these cases and respondent/cross-petitioner in several other of these cases.

Respondents before this Court, who were petitioners/cross-respondents in several cases below or were respondents/cross-petitioners in several other cases below are the United States Department of the Treasury, Financial Management Service; the United States Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois; the United States Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire; and the National Labor Relations Board. Respondents who were intervenors below are the National Treasury Employees Union; the American Federation of Government Employees, AFL-CIO; and the National Labor Relations Board Union.

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UNITED STATES DEPARTMENT OF THE TREASURY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

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[1] The American Federation of Government Employees, AFL-CIO, and the National Treasury Employees Union, party intervenors on behalf of the Authority in the consolidated proceedings below, have previously petitioned the Court for a writ of certiorari to the court of appeals' judgment here at issue. *American Federation of Government Employees, AFL-CIO* v. *Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland*, petition for cert. pending, No. 89-444; and *National Treasury Employees Union* v. *United States Dep't of Treasury, Financial Management Services and Federal Labor Relations Authority*, petition for cert. pending, No. 89-566.

OPINIONS BELOW

The judgment of the court of appeals (App. 1a-37a), granting the federal agency employers' petitions for review and denying the Authority's applications for enforcement of four decisions and orders of the Authority, is reported at 884 F.2d 1446. The decisions and orders of the Federal Labor Relations Authority (App. 38a-91a) are reported at 25 F.L.R.A. 560; 24 F.L.R.A. 917; 25 F.L.R.A. 828; and 24 F.L.R.A. 209.

JURISDICTION

The judgment of the court of appeals (App. 1a-37a) was entered on September 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1988); the Freedom of Information Act, 5 U.S.C. 552 (1988); and the Privacy Act, 5 U.S.C. 552a (1988), are reproduced in the appendix (App. 112a-124a).

STATEMENT

1. The Federal Service Labor-Management Relations Statute (Statute) governs labor-management relations in the federal service.[2] Under the Statute,

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[2] The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

the responsibilities of the Federal Labor Relations Authority (Authority) include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. 7105(a)(1), (2); see also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983). The Authority may petition for enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of Authority orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

Congress specified in the Statute that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as a dues-paying member. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117. A grievance arbitra-

tion procedure must be included in any negotiated agreement. 5 U.S.C. 7121(a).

A provision enacted by Congress in the Statute to facilitate union representation and enable unions to meet their representational duties is Section 7114 (b)(4). That section requires a federal employer to furnish the exclusive bargaining representative "to the extent not prohibited by law" with any requested data that is, among other things, "reasonably available"; "normally maintained by the agency in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]"; "refuse to consult or negotiate in good faith with any labor organization"; or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

2. The Authority held in its four decisions and orders in this case that federal employer agencies are required under 5 U.S.C. 7114(b)(4) to provide to an exclusive representative the names and home addresses of bargaining unit employees (App. 38a-91a). In reaching its conclusions in these four decisions here at issue, the Authority relied on its lead decision on remand from the D.C. Circuit in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986) (*FHAFO*), enforced in part and remanded sub nom. *United States Department of Agriculture* v. *FLRA*, 836 F.2d 1139

(8th Cir. 1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989) (App. 93a-111a).[3]

FHAFO involved an unfair labor practice (ULP) proceeding brought against a federal employer agency based on its refusal to furnish the union with the names and home addresses of all unit employees (App. 93a). The Authority determined that, under Section 7114(b)(4) of the Statute, names and home addresses must be disclosed to the union (App. 98a-107a). The Authority indicated in *FHAFO* that under Section 7114(b)(4) of the Statute it must determine, among other things, whether disclosure of the names and home addresses of bargaining unit employees is prohibited by law; and whether the information is reasonably available and necessary within the meaning of Section 7114(b)(4) (App. 98a).

In considering whether disclosure of the data was prohibited by law pursuant to Section 7114(b)(4),

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[3] The Second Circuit reversed the Authority's ruling prior to *FHAFO*, that an employer agency was not required under Section 7114(b)(4) of the Statute to release employee names and home addresses to the employees' exclusive representative because such disclosure was prohibited under the Privacy Act, 5 U.S.C. 552a (App. 95a). *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986).

Following the issuance of *FHAFO*, other Authority decisions and orders relying on *FHAFO* were appealed to several circuit courts of appeals where those decisions were enforced. *United States Dep't of Navy and Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d 1131, 1137-39 (3d Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988); *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d 229, 231-32 (7th Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988); and *United States Dep't of Health and Human Services* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), petit. for cert. dismissed, 109 S. Ct. 632 (1988).

the Authority in *FHAFO* considered the two relevant exceptions to the Privacy Act's bar to unconsented disclosure of information about individuals: exception (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2), concerning disclosure required by the Freedom of Information Act (FOIA); and exception (b)(3), 5 U.S.C. 552a(b)(3), relating to disclosure which constitutes a "routine use" of information (App. 98a).

The Authority, in considering the FOIA exception (5 U.S.C. 552(b)(6) (Exemption 6)) to the Privacy Act's general rule of nondisclosure, held that FOIA Exemption 6 would not bar disclosure under the FOIA (App. 100a-101a). Therefore, the Authority held, disclosure of the data was not barred by the Privacy Act (App. 101a). Balancing pursuant to Exemption 6 the public interest served by release against employee privacy interests, the Authority found that the balance favors disclosure to the union of unit employee names and home addresses (App. 99a-100a). The Authority stated that Congress in Section 7101 of the Statute found collective bargaining in the federal government to be in the public interest (App. 99a-100a). Further, the Authority indicated that disclosure would contribute to the union's ability to communicate effectively with its bargaining unit employees, thereby enabling it better to fulfill its responsibilities under the Statute (App. 100a).

The Authority also agreed (App. 100a) with the Second Circuit's conclusion in *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554, 556 (2d Cir. 1986) that "the privacy interest of the average employee in his address is not particularly compelling." Additionally, the Authority indicated that employees may protect their individual privacy interests by discarding unsolicited mail from the union, and requesting that

their names be deleted from the union's mailing list (App. 100a). Further, the Authority held that employer agency withholding of employee names and home addresses could properly be based on a showing of "imminent danger" to an employee if that data were released (App. 107a).

Turning to exception (b)(3) of the Privacy Act, the Authority held that the "routine use" exception to the Privacy Act's prohibition on unconsented release of data also eliminated that Act as a barrier to disclosure under Section 7114(b)(4) (App. 102a). The Authority noted (App. 101a) that the Office of Personnel Management (OPM) has published a notice of routine use for federal employee personnel files which contain employee names and home addresses.[4] Among the routine uses included in the notice concerning employee personnel files was disclosure to union officials "when relevant and necessary to their duties of exclusive representation" (App. 101a). The Authority found this routine use to be essentially the same as the requirement under Section 7114(b)(4) of the Statute, that disclosure of data be "necessary for full and proper discusion, understanding, and negotiation of subjects within the scope of collective bargaining" (App. 101a). Because the Authority found that the "necessary" standard of Section 7114(b)(4) was met concerning employee names and home addresses, it also concluded that disclosure falls within the routine use established by OPM (App. 101a-102a). Thus, the Authority concluded in *FHAFO* that "even if the disclosure was not au-

[4] The OPM routine use notice, 49 Fed. Reg. 36,949, 39,956 (Sept. 20, 1984), was a reissuance of the routine use notice published by OPM's predecessor, the Civil Service Commission. 40 Fed. Reg. 54,356, 54,362 (Nov. 21, 1975).

thorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3)" (App. 102a).[5]

3. In the four consolidated cases reviewed by the court below, various unions representing bargaining units of federal employees made requests for the names and home addresses of the employees they represent (App. 43a-44a, 55a, 62a, 88a). In the first case, *Dep't of the Treasury, Financial Management Service*, 25 F.L.R.A. 560 (1987), the employer agency refused the request of the National Treasury Employees Union ("NTEU" or "union") for employee names and home addresses (App. 43a-44a). The union indicated it needed unit employees' names and home addresses to give it the opportunity to reach all unit employees located at the Department of the Treasury, Financial Management Service ("FMS" or "agency") irregardless of whether the employees' work areas were restricted or secured (App. 44a).

In the second case, *Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois*, 25 F.L.R.A. 828 (1987), the American Federation of Government Employees, AFL-CIO ("AFGE" or "union"), requested employee name and home address lists to communicate with employees and learn their views about conditions of employment and legislative matters affecting them (App. 55a). The Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, and Social

[5] The Authority also held under Section 7114(b)(4) that the data was reasonably available and normally maintained by the agency in the regular course of business (App. 102a-107a).

Security Administration, Great Lakes Program Service Center, Chicago, Illinois ("SSA" or "agency") refused to provide the union with the requested information (App. 55a).

The third decision, *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 24 F.L.R.A. 209 (1986), involved a request for employee names and home addresses by the Federal Employees Metal Trades Council, AFL-CIO ("FEMTC" or "union"), which explained that the information was needed to contact unit employees who were on leave at their homes in order to process the employees' grievances and to send all unit employees a monthly union newsletter (App. 71a). The Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire ("Portsmouth Naval Shipyard" or "agency") denied FEMTC's request (App. 71a-72a).

In the fourth case, *National Labor Relations Board, Office of the General Counsel and the Board*, 24 F.L.R.A. 917 (1986), during collective bargaining negotiations between the National Labor Relations Board Union ("NLRBU" or "union") and the National Labor Relations Board ("NLRB" or "agency"), the union submitted a proposal which required, among other things, that the NLRB would furnish the union on an annual basis with names and home addresses of unit employees (App. 88a-89a). NLRB refused to bargain on the proposal (App. 88a).

In the three Authority cases involving ULP proceedings, the Authority determined based on *FHAFO* that the release of names and home addresses of employees in the bargaining unit to the unions was generally required without regard to whether alternative means of communication are available (App. 38a-39a, 47a, 55a-56a, 64a). The Authority found the

agencies' refusal to furnish the unions with the requested information constituted a violation of Section 7116(a)(1), (5) and (8) of the Statute (App. 49a, 56a, 64a). The Authority ordered the agencies to cease and desist from refusing to provide the unions with a copy of the names and home addresses of all employees it represents (App. 39a-40a, 56a-58a, 64a-65a). Further, the Authority required the agencies to provide the unions with copies of such information and to post appropriate notices at the agencies' facilities where employees represented by the unions are located (App. 39a-40a, 57a, 65a).

Also consistent with its decision in *FHAFO*, the Authority found in the NLRB negotiability case that the disclosure of the type of information sought by the union was not barred by law and was, in fact, essentially related to a union's ongoing representational responsibilities (App. 91a-92a). Thus, the Authority held, the proposal in this case which also sought release of unit employees' home addresses was negotiable (App. 91a). The Authority ordered the NLRB upon request or as otherwise agreed to by the parties to bargain concerning the disputed union proposal (App. 92a).

The Authority sought enforcement of its four decisions and orders in the D.C. Circuit and the employer agencies filed petitions for review of the decisions and orders (App. 4a).

4. The D.C. Circuit granted the federal employer agencies' petitions for review and denied the Authority's applications for enforcement in the four Authority cases which the court below consolidated for review (App. 4a). The opinion of the court below was authored by Circuit Judge Stephen Williams (App. 2a-23a), with Circuit Judges Ruth Ginsburg

and Sentelle filing separate concurring opinions (App. 24a-36a).

a. First, the court below deferred to the Authority's conclusion that the information disclosed was necessary for the collective bargaining process under Section 7114(b)(4), thus agreeing with every circuit court that had previously considered this issue (App. 4a-5a, citing *United States Dep't of Navy and Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d 1131, 1137-39 (3d Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988); *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d 229, 231-32 (7th Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988); *United States Dep't of Agriculture* v. *FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989); *United States Dep't of Health and Human Services* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), petit. for cert. dismissed, 109 S. Ct. 632 (1988); *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554, 557 (2d Cir. 1986)). The court of appeals noted that in *FHAFO* the Authority had found that the disclosure would "enable the Union[s] to communicate effectively and efficiently, through direct mailings to individual employees" (App. 5a, quoting *FHAFO*, 23 F.L.R.A. at 796). The court below found this analysis to be reasonable and consistent with private sector labor relations law (App. 6a).

Further, the court of appeals found nothing arbitrary or capricious about the Authority's finding that the release of the information met the "necessary" requirement under Section 7114(b)(4) even though alternative means of communication may be available (App. 6a-8a). The court noted that the advantages realized through at-home mailings were enough to

sustain the Authority's judgment (App. 7a). Again, the court found this view to be consistent with private sector labor law (App. 7a).

However, the court of appeals concluded that the Privacy Act barred disclosure of employee names and home addresses by agency employers (App. 9a-10a). The court first concluded (App. 9a) that the Authority's reliance on the FOIA exception to the Privacy Act's prohibition to unconsented disclosure could not survive in light of this Court's decision in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989) (*Reporters Committee*). The court below indicated that this Court in *Reporters Committee* found under FOIA that the disclosure interest must be measured in terms of its relation to FOIA's central purpose "to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny" (App. 11a, citing *Reporters Committee*, 109 S. Ct. at 1482 (emphasis in original)). Although the court below noted that this case involved Exemption 6 of FOIA and *Reporters Committee* involved Exemption 7(C) of FOIA (5 U.S.C. 552(b)(7)(C) (Exemption 7(C)), the court of appeals did not find this distinction significant (App. 11a).

Further, the court of appeals noted that this Court's recent ruling in *United States Dep't of Justice* v. *Tax Analysts*, 109 S. Ct. 2841 (1989) (*Tax Analysts*) might be thought to undermine the court of appeals' restricted view of Exemption 6 because *Tax Analysts* called for release of documents under FOIA which did not add anything to public knowledge of government agency operations (App. 11a-12a). However, the court of appeals did not find the decision to be dispositive since this Court in *Tax*

Analysts was not considering any FOIA exemption (App. 12a).

The court of appeals next considered whether the balancing of interests under FOIA Exemption 6 called for in *Reporters Committee* should be adjusted in this case in light of the Statute's explicit recognition that an effective and informed federal sector collective bargaining system serves the public interest (App. 14a). The court below recognized that the other courts of appeals that had previously enforced Authority rulings on this issue had relied on this public interest particular to the Statute (App. 10a-11a, 14a). However, the court below held that after *Reporters Committee* reliance on such a non-FOIA disclosure interest must be "either explained or abandoned" (App. 14a).

In this connection the court of appeals concluded that reliance on a non-FOIA disclosure interest is inconsistent with the Privacy Act's FOIA release exception to the prohibition on unconsented disclosure, 5 U.S.C. 552a(b)(2) (App. 15a). The court below noted that the Privacy Act's FOIA release exception does not reference release of data based on laws other than the FOIA, such as the Statute (App. 15a). Therefore, the court below declined to introduce collective bargaining values into the FOIA balancing process (App. 15a).[6]

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[6] The court below also rejected the Authority's holding that the "routine use" exception to the Privacy Act's bar on unconsented disclosure of personal data, 5 U.S.C. 552a(b)(3), is applicable (App. 16a-22a). The court relied exclusively on a June 25, 1987, letter from the then-Director of OPM to the Justice Department, prepared in direct connection with litigation on this issue before the Authority (App. 18a-22a). In that letter the Director of OPM stated that OPM's official interpretation of its routine use did not encompass release

b. Judge Ruth B. Ginsburg "reluctantly" concurred in the court's holding, but found it unlikely that Congress in the Statute intended to preclude federal sector unions from obtaining name and home address lists, which are routinely provided to private sector unions (App. 33a). Judge Ginsburg observed in this connection that every court to decide this issue before *Reporters Committee* reached a different result from the court below based on the public interest in collective bargaining recognized in the Statute, thus avoiding discrepancies between the treatment of federal and private sector unions (App. 25a). Judge Ginsburg suggested that whether this Court would have qualified its *Reporters Committee* decision had it envisioned the instant case, and whether Congress would opt to provide federal sector unions with name and home address lists if it was aware of the court's reading of Section 7114(b)(4) of the Statute, were questions now ripe for consideration (App. 24a-25a).

Judge Ginsburg also noted that this Court's *Reporters Committee* decision appears "an anomaly" when compared with the Court's decision in *Tax Analysts* (App. 25a). Finally, Judge Ginsburg concluded (App. 25a) that when the Statute's identification of the public interest in an effective system of federal sector collective bargaining is weighed against the "modest" privacy interest employees have in their home addresses, the balance clearly favors disclosure.

Judge Sentelle concurred in the court's conclusion concerning the Privacy Act, but expressed misgivings

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of employee names and home addresses to unions if adequate alternative means of communication exist (App. 18a). In the absence of such a showing here of inadequacy of alternative means of communication, the court rejected the Authority's holding on the "routine use" exception (App. 22a).

on the Authority's interpretation of Section 7114(b)(4) (App. 34a). Judge Sentelle was of the view that employee names and home addresses were not necessary to a union's engaging in collective bargaining under the Statute (App. 34a-36a).

REASONS FOR GRANTING THE PETITION

Review is warranted because the court of appeals decided an important issue for efficient federal sector collective bargaining, which issue is currently the subject of more than 200 cases in the court of appeals below, in a manner contrary to the result reached by several other courts of appeals that have ruled on the matter. In this connection, several other courts of appeals have held that federal sector unions are entitled to receive employee names and home addresses under Section 7114(b)(4) of the Statute (see p. 5 n.3, *supra*). Moreover, the lower court's ruling is premised on an erroneous application of this Court's *Reporters Committee* decision, an error that only this Court can authoritatively rectify. Correction of the court of appeals' error will, among other things, eliminate the unwarranted disparity created by the lower court's ruling between means available to private and federal sector unions for communicating with bargaining unit employees.

I. The decision of the court below involves an issue of considerable importance to the efficient conduct of federal sector labor relations, and is appropriate for review by the Court at this time

The result reached by the court below directly conflicts with the results reached by the Fourth,[7] Sev-

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[7] *United States Dep't of Health and Human Services* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), petit. for cert. dismissed, 109 S. Ct. 632 (1988).

enth,[8] Third[9] and Eighth[10] Circuits, which have enforced Authority orders in cases on the same issue involved here. Further, the Second Circuit reversed the Authority's prior ruling on this issue, that federal employer agencies were not required to provide employee names and home addresses to unions representing those employees.[11] With the exception of the Seventh Circuit,[12] these circuit courts have found, based on the public interest in effective federal sector collective bargaining recognized in the Statute, that the Privacy Act did not bar disclosure because disclosure would be required under the FOIA. Therefore, these courts held, disclosure was not prohibited by law under Section 7114(b)(4). As Judge Ruth Ginsburg noted in her concurrence in this case (App. 25a), those circuits sought to avoid the kind of discrepancy in the treatment of federal and private sector unions that the lower court's decision creates. Thus, the decision below departs from the consensus

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[8] *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d 229, 231-32 (7th Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988).

[9] *United States Dep't of Navy and Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d 1131, 1137-39 (3d Cir.), petit. for cert. dismissed, 109 S. Ct. 632 (1988).

[10] *United States Dep't of Agriculture* v. *FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989).

[11] *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554, 557 (2d Cir. 1986).

[12] The Seventh Circuit found that the FOIA itself called for the disclosure here at issue; and because a union would prevail under the FOIA itself in a suit for that information, there is no point in denying access under the Statute. *United States Dep't of the Air Force* v. *FLRA*, 838 F.2d at 231-32.

arrived at by the other circuit courts which have considered this issue.

The fact that the court below is the only court of appeals to have considered this issue in light of *Reporters Committee* is no reason to delay this Court's review of the lower court's holding. First, the sole factor leading the court below to rule contrary to the five other circuits that have resolved this issue in the Authority's favor is the lower court's reasoning that this Court intended *Reporters Committee* to apply to this case, without reference to the particular interests served by the Statute (App. 9a). Consequently, it is immaterial how many circuit courts might express their views as to this Court's possible intent concerning how *Reporters Committee* applies to the issue here. It is only this Court that can clarify the implications of *Reporters Committee* for this case. Compare *Securities and Exchange Comm'n* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967) (certiorari granted to reverse a D.C. Circuit decision that erroneously viewed a prior decision by this Court as controlling). Moreover, it is questionable whether a circuit split will arise in the future on the issue of *Reporters Committee*'s applicability, because employer agencies will be able to bring all future Authority name and home address decisions to the D.C. Circuit under the Statute's venue provision, 5 U.S.C. 7123 (a).

Second, the D.C. Circuit currently has before it for review approximately 200 Authority decisions on this issue where proceedings were stayed pending resolution of the instant group of lead cases. A definitive ruling by this Court at this time on the lower court's decision would therefore be desirable in order to dispose authoritatively of this vast amount of litigation.

Compare *Laing* v. *United States*, 423 U.S. 161, 167 (1976) (this Court granted certiorari in case where some 70 pending cases in the federal courts depended on its resolution). Furthermore, a resolution of the issue by this Court at this time will eliminate undue delay in ascertaining whether the disparity between federal and private sector unions noted by Judge Ruth Ginsburg (App. 24a) should exist concerning the tools available to unions to communicate with unit employees.

Finally, the issue in this case is an important one in its own right. Effective communications between unions and the employees they represent can only foster greater efficiency in federal sector collective bargaining. Effective communications enable unions to ascertain employees' desires more accurately, and thus formulate bargaining demands more closely attuned to employee interests. Such communication further eliminates time wasted in pressing bargaining demands of no real interest to employees. This result benefits agency management as well, because management negotiators will not be spending time bargaining on proposals not related to employee concerns. Also, under the Authority's ruling unions are enabled to communicate in the most effective manner with individual employees with respect to grievances, backpay awards and other employee rights and benefits. The improved communications effected under the Authority's ruling by union direct mailings to unit employees' homes thus also facilitates the unions' fulfillment of their duty of fair representation under the Statute. 5 U.S.C. 7114(a)(1).

As the Authority found (App. 100a-101a) and the court below sustained (App. 7a), one of the best means of ensuring effective union-employee communi-

cation is by enabling the unions to communicate with their constituents through direct mail at employees' homes. Other means of union-employee communication such as worksite visits, meetings, bulletin boards, and newsletter distributions at the workplace do not afford the same comprehensive coverage. These forms of communication may be subject to employer influence and are not conducive to the same thoughtful consideration that mailings at home provide. For these reasons review by this Court is plainly warranted.

II. The court below erroneously decided the question in this case

A. Based entirely upon this Court's intervening decision in *Reporters Committee* the court below reversed the Authority's decision in this case. *Reporters Committee* concerned a request directly under the FOIA by representatives of the media for the release of information from Federal Bureau of Investigation (FBI) criminal records, or rap-sheets, on certain individuals. This Court reached its conclusion that the rap-sheets were exempt from disclosure under FOIA Exemption 7(C) by balancing the individual interest in privacy, and the public interest in disclosure.

On the public interest side of the balance, this Court found no cognizable public interest warranted the invasion of the privacy interest involved. The Court held that to overcome individual privacy interests, the information requested must bear a relationship to the basic purpose of the FOIA, that is, "to open agency action to the light of public scrutiny." 109 S. Ct. at 1481, citing to *Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976). In balancing privacy interest concerns against this public interest,

this Court concluded in *Reporters Committee* that the "privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.*, 109 S. Ct. at 1485.

The lower court's determination rejects the critical distinction between this case and *Reporters Committee*. The request for information in this case arises under the Statute, whereas the request for information in *Reporters Committee* arose under the FOIA itself. The court below, by applying *Reporters Committee* analysis directly to this case, has treated the union like any member of the public requesting FOIA documents. This result is wholly inappropriate because it ignores the specific relationships among federal sector unions, bargaining unit employees and federal employer agencies that are set out carefully by Congress in the Statute.

For example, federal sector unions have a duty of fair representation to employees they represent, imposed by Congress under Section 7114(a)(1) of the Statute. Congress has explicitly directed these unions to "represent[] the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. 7114(a)(1). See also *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 109 S. Ct. 1282, 1285-1286 (1989); and *NTEU* v. *FLRA*, 721 F.2d 1402 (D.C. Cir. 1983). As Judge Ruth Ginsburg recognized below in her concurrence (App. 27a), fulfillment of this statutory duty is enhanced by the disclosure of employees' names and home addresses and the improved communications such disclosure promotes.

Another aspect of the specific relationship under the Statute among employer agencies, federal em-

ployees, and their unions is the fact that bargaining unit employees can vote to decertify a union as their exclusive representative. See 5 U.S.C. 7111(b)(1)(B). This action would deprive the union of its basis for requesting the data under Section 7114(b)(4). By contrast a data subject under FOIA has no such power over a data requester. Finally, federal agency employers have a statutory duty to bargain with the union, of which appropriate data disclosure is a part. 5 U.S.C. 7114(b); see also *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983). The FOIA, of course, was not enacted to promote a system of collective bargaining.

The court below swept aside this interrelating series of statutory rights and obligations by holding that *Reporters Committee* applied without alteration to this case. This disregard for the carefully crafted scheme in the Statute, with the policy interests it serves, is grave error in itself. In fact, it makes little sense to conclude, as the court below did, that Congress in the Statute intended to create a web of special rights and duties among federal employer agencies, unions, and employees; and then require unions to be treated like any member of the public at large for data disclosure purposes under Section 7114(b)(4).

The court below should have given effect to congressional recognition that effective collective bargaining is in the public interest under Section 7101(a) of the Statute, and that the data disclosure here at issue assists in achieving this result. As this Court has noted, when ascertaining the meaning of a law one must look to the language and design of the law as a whole. *K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988).

The lower court's basis for rejecting the policies of the Statute in its FOIA analysis was that the Privacy Act's FOIA release exception (5 U.S.C. 552a (b)(2)) to the prohibition on unconsented disclosure makes no reference to laws other than FOIA itself. However, this point begs the question. The mandate of FOIA Exemption 6 is to balance public and privacy interests in assessing whether data should be disclosed. Simply because the Privacy Act's FOIA release exception to nondisclosure makes no reference to laws other than the FOIA itself does not mean that the balancing of public and privacy interests under FOIA Exemption 6 cannot be undertaken with reference to the policies of the laws under which a case arises. Cf. *Reporters Committee*, 109 S. Ct. at 1483 (FOIA Exemption 7(C) requires balancing of public and privacy interests, but methodology for measuring these values is judicially devised).[13]

B. Moreover, the lower court's ruling creates discrepancies between federal and private sector unions that could not have been intended under *Reporters Committee*, as Judge Ruth Ginsburg suggests in her opinion below (App. 27a-28a). Under the lower court's ruling unions in the federal sector are placed at considerable disadvantage as to employee communication in comparison to unions in the private sector. It is well-settled under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, that private sector employers are required to provide employees' names and home addresses to unions. See,

[13] Due to the significance of the Statute in this case, a Court decision recognizing the Statute's proper role would not constitute precedent for a request for names and home addresses brought directly under the FOIA, an issue the Court has not yet addressed.

e.g., *United Aircraft Corp.* v. *NLRB*, 434 F.2d 1198 (2d Cir. 1970), cert. denied, 401 U.S. 993 (1971); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).[14] The employer's duty to supply this information is part and parcel of the fundamental duty to bargain. *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975).

Congress intended unions in the public sector to be placed in parity with unions in the private sector. In drafting the Statute, the legislators paid close attention to the judicial decisions in private sector labor law cases. See *NTEU* v. *FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987). Congress modeled the Authority and the Statute on the National Labor Relations Board and the NLRA. See *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. at 92-93. Both the NLRA and the Statute present similar definitions of collective bargaining and serve similar purposes. See *United States Dep't of Health and Human Services* v. *FLRA*, 833 F.2d at 1132.

It is particularly significant, as Judge Ginsburg noted (App. 27a) below, that the Statute states: "experience *in both private and public sector employment* indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing . . . *safeguards the public interest.*" 5 U.S.C. 7101(a)(1) (emphasis added). Congress has identified no policy concern to warrant different treatment of unions in the federal sector from unions in the private sector for purposes of re-

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[14] See also *Star Tribune, A Division of Cowles Media Co.*, 295 N.L.R.B. No. 63 (June 15, 1989); *Massillon Hospital Ass'n*, 282 N.L.R.B. 675 (1987); and *Georgetown Holiday Inn*, 235 N.L.R.B. 485 (1978).

leasing the information involved. *United States Dep't of Health and Human Services* v. *FLRA*, 833 F.2d at 1132.

The court below offers no persuasive reason for concluding that federal sector unions are not entitled to the communication tool here at issue. Further, there is no reason to conclude that federal sector employees should expect greater privacy with respect to their exclusive representative under Section 7114(b)(4) and the Privacy Act than private sector employees are entitled to. This Court made clear in *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979) that private sector unions' access to employer-maintained data on employees is restricted only in the case of data that is highly sensitive in nature. The employees' names and home addresses at issue here clearly do not rise to the level of sensitivity under *Detroit Edison* or comparable private sector cases. See *AFGE, Local 1760* v. *FLRA*, 786 F.2d at 556 ("privacy interest of the average employee in his address is not particularly compelling").

Thus, because there is no indication that this Court intended in *Reporters Committee* to do away with well-established private sector labor law principles concerning the release of employees' names and home addresses under the NLRA, the Statute and the NLRA should be construed *in pari materia*. See, *e.g.*, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). The court below therefore erred in not seeking to make private and federal sector law consistent on this issue.

C. When the appropriate public interest is recognized in this case, that is, the facilitation of the collective bargaining process in the federal sector, it clearly outweighs the relatively minor privacy interest in employees' home addresses. The web of fed-

eral statutory and regulatory provisions that limited the disclosure of rap-sheet information in *Reporters Committee* is in sharp contrast to the statutory scheme in this case. Federal statutory and regulatory provisions limit the disclosure of rap-sheets, thus indicating an expectation of privacy for that data. *Reporters Committee*, 109 S. Ct. at 1472-73. In sharp contrast, the privacy interests threatened by the release of the names and home addresses of bargaining uni employees in the instant case is far less compelling than those involved in *Reporters Committee*. Most circuit courts have concluded there is only a minimal privacy interest in the release of individuals' names and home addresses. *United States Dep't of Navy and Philadelphia Naval Shipyard* v. *FLRA*, 840 F.2d at 1137 ("minimal invasion of privacy"); *AFGE, Local 1760* v. *FLRA*, 786 F.2d at 557 ("not particularly compelling"); *Ditlow* v. *Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) ("less than a substantial invasion of privacy"); *Getman* v. *NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971) ("invasion itself is to a very minimal degree"). The disclosure of the employees' names and home addresses in this case shows little more than the bargaining unit status of each employee, as Judge Ruth Ginsburg recognized below (App. 31a).[15]

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[15] As Judge Ginsburg also noted below (App. 32a-33a), the significance of the privacy interest in this case is further diminished because FOIA Exemption 6 is involved here, not FOIA Exemption 7(C), as was at issue in *Reporters Committee*. A substantially greater privacy interest must be involved to warrant withholding under FOIA Exemption 6 than is needed to warrant withholding under Exemption 7(C). *FBI* v. *Abramson*, 456 U.S. 615, 629 n.13 (1982).

Combining the inherently minimal privacy interest in one's home address with applicability of Exemption 6, it is doubtful

Further, as Judge Ruth Ginsburg noted in her opinion below (App. 32a), Congress has indicated in Section 7114(b)(4) of the Statute that employees have a reduced expectation of privacy regarding information that facilitates collective bargaining.[16] For example, performance appraisals and disciplinary records, information of far greater privacy interest than the names and home addresses of employees, are available to unions under the Statute. See, *e.g.*, *AFGE* v. *FLRA*, 811 F.2d 769 (2d Cir. 1987) (employees' official time and attendance records; progress reviews and performance appraisals; and various documents bearing on employees' work performance to be provided to union); *North Germany Area Council, OEA* v. *FLRA*, 805 F.2d 1044 (D.C. Cir. 1986) (employee disciplinary information to be provided).

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that the lower court's ruling is correct even under *Reporters Committee* analysis without reference to the Statute's public interest in effective federal sector collective bargaining. The court below did identify a minimal public interest in disclosure, *i.e.*, an investigative reporter's more effective access to federal employees at home, to inquire about how the government works. Pitting this minimal public interest in disclosure against the minimal privacy interest involved, the balance should tilt in favor of disclosure under Exemption 6. *Washington Post Co.* v. *United States Dep't of Health and Human Services*, 690 F.2d 252, 261 (D.C. Cir. 1982).

[16] The court of appeals' holding that FOIA blocks public sector unions from access to federal employees' names and home addresses becomes all the more anomalous when set against the outcome in *United States Dep't of Justice* v. *Tax Analysts*, 109 S. Ct. 2841 (1989). In *Tax Analysts* this Court required the release of information under FOIA to a publishing enterprise where the release of such data added nothing to the public's knowledge of government agency operations.

In sum, the relatively minor privacy invasion occasioned by release of employee home addresses is far outweighed by the proper public interest in disclosure to be recognized in this case—enhancing the efficiency of the federal collective bargaining scheme by ensuring effective communications between federal unions and the employees they represent. Review by this Court is therefore appropriate to correct the court of appeals' erroneous contrary view.[17]

CONCLUSION

The petition for a writ of certiorari should be granted to review the lower court's decision.[18]

Respectfully submitted.

WILLIAM E. PERSINA *
Solicitor

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* Counsel of Record

NOVEMBER 1989

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[17] The court of appeals also erred in concluding (App. 9a-10a) that the Privacy Act did not bar disclosure because such disclosure does not constitute a "routine use" for the data at issue under 5 U.S.C. 552a(b)(3). The OPM "interpretation" of its routine use originated in briefs submitted by OPM attorneys to the Authority in connection with litigation on the name and home address issue. Reliance on this litigation-inspired "interpretation" is inappropriate. See, *e.g.*, *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977).

[18] The Acting Solicitor General has authorized the filing of this petition.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 7, 1988 Decided September 12, 1989

No. 87-1107

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

U.S. DEPARTMENT OF THE TREASURY,
FINANCIAL MANAGEMENT SERVICE, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION,
NATIONAL LABOR RELATIONS BOARD UNION,
INTERVENORS

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and consolidated case Nos. 87-1108, 87-1115, 87-1121
87-1129 & 87-1319

Petitions for Review and Cross-Applications
for Enforcement of Orders of the
Federal Labor Relations Authority

William E. Persina, Deputy Solicitor, Federal Labor Relations Authority ("FLRA"), with whom *Ruth E. Peters*, Solicitor, and *Pamela P. Johnson*, Attorney, FLRA, were on the brief, for petitioner in Nos.

87-1107, 87-1115 & 87-1121, and respondent in Nos. 87-1108, 87-1129 & 87-1319.

Al J. Daniel, Jr., Attorney, Department of Justice, with whom *Richard K. Willard*, and *John R. Bolton*, Assistant Attorneys General, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for respondents in Nos. 87-1107, 87-1115 & 87-1121, and petitioners in Nos. 87-1108, 87-1129 & 87-1319. *Jay B. Stephens*, United States Attorney, and *Sandra Wien Simon*, Attorney, Department of Justice also entered appearances.

Elaine D. Kaplan, with whom *Lois G. Williams* and *Gregory O'Duden* were on the brief, for intervenor National Treasury Employees Union in Nos. 87-1107 & 87-1129.

Joseph F. Henderson, with whom *Mark D. Roth* was on the brief, for intervenor American Federation of Gov't Employees, AFL-CIO in Nos. 87-1115 & 87-1319.

Lewis S. Harris entered an appearance for intervenor National Labor Relations Board Union in Nos. 87-1107 & 87-1108.

Before RUTH B. GINSBURG, WILLIAMS and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Concurring Opinion filed by *Circuit Judge* RUTH B. GINSBURG.

Concurring Opinion filed by *Circuit Judge* SENTELLE.

WILLIAMS, *Circuit Judge*: In the four decisions under review, *Department of the Treasury, Financial Management Service*, 25 FLRA 560 (1987); *Department of Health and Human Services, Social Security Administration, Baltimore, Md. and Social Security*

Administration, Great Lakes Program Service Center, Chicago, Illinois, 25 FLRA 828 (1987); *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 24 FLRA 209 (1986); *National Labor Relations Board, Office of the General Counsel and the Board*, 24 FLRA 917 (1986), the Federal Labor Relations Authority ordered government agencies to comply with union requests for the names and home addresses of agency employees working in the relevant bargaining units. The unions stated that they needed the information to perform their representational duties effectively and that they were therefore entitled to it by 5 U.S.C. § 7114(b)(4) (1982). This requires agencies

> to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

Relying on its decision in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA 788 (1986), *aff'd in substantial part and remanded sub nom. Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989), the Authority held that agencies commit unfair labor practices when they refuse to supply authorized unions with employees' names and home addresses.[1]

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[1] In a ruling on an issue peculiar to the NLRB case, the Authority held that a union proposal to require annual disclosure of the data was negotiable and ordered the agency to bargain over the proposal upon request by the union. This

Each of the agencies appealed to this court, where the cases were consolidated. They argue first that the information is not "necessary for . . . discussion, understanding, and negotiation of subjects within the scope of collective bargaining," and second that disclosure is "prohibited by law," specifically by the Privacy Act, 5 U.S.C. § 552a. We agree with all the other circuits that have addressed the first issue that, under the deference the Authority is due on such matters, its interpretations of § 7114(b)(4) is permissible. Nevertheless, we must set aside the Authority's decisions; we are persuaded that release of the information is prohibited by the Privacy Act. Reviewing this issue de novo, we find that the Authority erred when it determined that disclosure fell within either the Act's exception for disclosures required by the Freedom of Information Act, 5 U.S.C. § 552(b)(2), or the exception for disclosures made in accordance with a "routine use," 5 U.S.C. § 552a(b)(3). Thus we grant the agencies' petitions for review and deny the FLRA's applications for enforcement.

I. Disclosure "Necessary" for the Collective Bargaining Process

To the extent that the FLRA is interpreting its own enabling statute, we cannot upset its "reasonable and defensible construction[]." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (FLRA intended by Congress to use "specialized expertise" to "give content to the principles and goals set forth in the Act"). Given this standard of review, it is not surprising that every circuit

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holding was justified solely by the analysis articulated in *Farmers Home Administration*. See *NLRB*, 24 FLRA at 920.

court that has reviewed the matter has upheld the FLRA's view of whether disclosure is "necessary" for the collective bargaining process under § 7114 (b)(4). *Department of the Navy v. FLRA*, 840 F.2d 1131, 1137-39 (3d Cir. 1988); *Department of the Air Force v. FLRA*, 838 F.2d 229, 231-32 (7th Cir. 1988); *Department of Agriculture v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989); *Department of Health and Human Services v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987); *AFGE v. FLRA*, 786 F.2d 554, 557 (2d Cir. 1986). We agree.

The agencies first contend that § 7114(b)(4)(B) requires disclosure only of data relating directly to subjects of contract negotiation; it regards the employees' names and addresses as relating merely to "the union's relationship with bargaining unit employees." Brief for Government Agencies 21. The FLRA, on the other hand, views as sufficient a relationship to the "union's ongoing representational responsibilities." *NLRB*, 24 FLRA at 920. It found in *Farmers Home Administration* that disclosure would "enable the Union[s] to communicate effectively and efficiently, through direct mailings to individual employees." 23 FLRA at 796.

This analysis is not unreasonable. As the Fourth Circuit noted, "The Union's duties as the exclusive representative of agency employees do not begin and end abruptly with each round of negotiations but continue during the interim." *Department of Health and Human Services*, 833 F.2d at 1132. The statutory references to "discussion" and "understanding" of subjects within the scope of collective bargaining provide some support for the Authority's reading. If the information is used to discover employee con-

cerns, clearly it can enhance the usefulness of collective bargaining.

In addition, the Authority's view corresponds to that of private sector labor relations law. In *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 83-85 (2d Cir. 1969), the court found that union communications with members of the bargaining unit related to the union's representational obligations. But compare *id.* at 85-87 (Friendly, J., dissenting) (arguing that true union purpose was recruitment of new members, a goal he found inadequate to justify forced release of employee names and addresses). As we agree that the FLRA's expansive interpretation is reasonable, we will not disturb it.

Next the agencies argue that the names and addresses are not "necessary" for the purpose stated because alternate means are available for communication between unions and government employees—desk drops, bulletin boards, "direct distributions," meetings and direct personal contact. Brief for Government Agencies 23. In *Farmers Home Administration*, the FLRA noted two advantages of mailings to home addresses. First, "content, timing and frequency" of communications would be entirely within union discretion, thus excluding the possibility of agency interference. 23 FLRA at 796-97. Second, the communications would be received under circumstances where employees could give them extended attention "without regard to the time constraints inherent in their work environments [or] any restraint the employee may feel as a result of the presence of agency management." *Id.* at 797.

While there is no evidence in the record either that agency management has interfered with on-the-job communications, or that employees could not pocket

materials received at work for leisurely study at home, we do not believe the Authority's finding that release is "necessary" is either arbitrary or capricious. Necessity is a matter of degree, and in many contexts courts have found a statutory requirement of necessity satisfied even when alternative means were feasible. See *NRDC v. Thomas*, 838 F.2d 1224, 1236-38 (D.C. Cir. 1988) (citing cases); *cf. Board of Trustees of State University of New York v. Fox*, 57 U.S.L.W. 5015, 5017 (U.S. June 29, 1989) (speech restriction may be no broader than "necessary" to achieve goal even though it is not least restrictive alternative). Where, as here, the Authority clearly regarded the burden of disclosure on the agency and on employees as quite modest, and was entitled to do so for purposes of the interpretation of the Federal Labor Management Relations Act (FOIA and Privacy Act matters are a different story, discussed below), modest advantages realized through at-home mailings are enough to sustain its judgment. Again, the Authority's view agrees with that of private sector labor law. *Prudential Insurance Co. v. NLRB*, 412 F.2d at 81-83; but see *id.* at 85-86 (Friendly, J., dissenting) (alternative means of communication were adequate though not ideal).

Because it believed that home mailings would facilitate union-employee communications in certain ways, the Authority adopted a presumption of necessity, which could be rebutted "where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in imminent danger if the union knew where they lived." *Farmers Home Administration*, 23 FLRA at 798. We assume that the Authority will be alert to

any special instances where disclosure imposes such safety risks or other out-of-the-ordinary burdens. The Eighth Circuit on its own motion conditioned its affirmance of the Authority's disclosure order on the withholding of names and addresses of employees who so requested, observing that mailings by a union to those who did not wish to receive them would scarcely serve the public interest. *Department of Agriculture*, 836 F.2d at 1143-44. In response to the FLRA's petition for certiorari, however, the Solicitor General rejected this position, saying that he found no basis for an " 'individualized' veto" in the statute. See Brief for the Respondents 17-18, *FLRA v. Department of Agriculture*, 109 S. Ct. 831 (1989). (The Supreme Court remanded the case for reconsideration in light of "routine use" notices filed by the relevant agencies.) But compare *Department of the Air Force v. FLRA*, 838 F.2d 229, 233 (7th Cir. 1988) (suggesting desirability of individual check-off system, but not mandating it in light of absence of request). While we uphold the FLRA's rejection of a case-by-case approach as within its authority, we rest our conclusion on the assumption that it will be sensitive to legitimate claims that disclosure will impose undue burdens.[2]

II. The Privacy Act

The statute on which the FLRA relies for its disclosure orders, 5 U.S.C. § 7114(b)(4), requires agencies to supply data only "to the extent not prohibited

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[2] Despite our finding below that the proposed releases do not fall within the "routine uses" exception to the Privacy Act on the facts presented here, that exception may well be available in other cases. Cf. *FLRA v. Department of Agriculture*, 109 S. Ct. 831 (1989) (remand for reconsideration in light of new "routine use" notices).

by law." The agencies contend that release of employee names and addresses would violate the Privacy Act, which prohibits the disclosure of personal information about federal employees without their consent. 5 U.S.C. § 552a(b) (1982). The FLRA does not dispute that the information is protected by the general language of the Privacy Act, but argues that the release falls within two explicit exceptions. First, § 552a(b)(2) allows disclosure that is "required under section 552 of this title [the Freedom of Information Act]." Second, § 552a(b)(3) allows disclosure "for a routine use." Under the latter provision, disclosure is proper only if it is in accordance with a routine use notice, published in the Federal Register by the relevant agency and describing "the categories of users and the purpose of such use." See 5 U.S.C. § 552a(e)(4)(D).

As the FLRA is not charged with a special duty to interpret either the Privacy Act or the FOIA, we do not defer to its interpretations of those statutes but review them de novo. *Illinois National Guard v. FLRA*, 854 F.2d 1397, 1400 (D.C. Cir. 1988); *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *Professional Airways Systems Specialists v. FLRA*, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). We do not believe that the FLRA's reliance on the FOIA exception to the Privacy Act can survive the recent Supreme Court decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).[3] Nor are we persuaded that disclosure of employees' names and

[3] The Court granted certiorari in *Reporters Committee* on April 18, 1988, 108 S. Ct. 1467, after oral argument of this case. After the Court's decision issued on March 22, 1989, we ordered supplemental briefing.

home addresses to union representatives is authorized by the only routine use notice relevant here, one published by the Office of Personnel Management. OPM has interpreted the routine use to require a rigorous showing of the need for direct mailings in light of the available alternate methods of communication, and we owe great deference to its interpretation of its own regulations.

A. *The Freedom of Information Act Exception*

While the Privacy Act generally prohibits disclosure of personnel information, it excepts disclosures "required under" FOIA. 5 U.S.C. § 552a(b)(2). FOIA in turn generally requires disclosure, but exempts information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Application of exemption 6 requires a balancing of the harm to the individual whose privacy is breached against the public interest served by disclosure. See *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The FLRA rejected the agencies' invocation of exemption 6, stating that "[o]n balance, . . . the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses." *Farmers Home Administration*, 23 FLRA at 793. With one exception,[4] the circuit court decisions upholding disclosure have simi-

[4] The Seventh Circuit followed our own decision in *Reporters Committee* and treated the disclosure interest as a fixed quantity for all cases, regardless of the character of the particular information at stake. *Department of Air Force*, 838 F.2d at 232-33.

larly considered the *special* public interest in advancing collective bargaining as an aspect of the disclosure value, and indeed, as the clinching value. See *Department of Navy*, 840 F.2d at 1135-37; *Department of Agriculture*, 836 F.2d at 1142-44; *Department of Health and Human Services*, 833 F.2d at 1134-36; *AFGE*, 786 F.2d at 556-57.

In *Reporters Committee*, however, the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—"to ensure that the *Government*'s activities be opened to sharp eye of public scrutiny." 109 S. Ct. at 1482 (emphasis in original); see also *id.* at 1481 ("democracy cannot function unless the people are permitted to know *what their government is up to*") (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973) (emphasis in original)). However great might be the generalized public interest in FBI "rap" sheets (criminal records) of non-government officials, the Court found it irrelevant to the interest in government activities and thus to FOIA privacy balancing. Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the *character* of the disclosure interest should be different under exemption 6. While exemption 6 precludes only "a *clearly* unwarranted invasion of personal privacy" (emphasis added), that difference between it and exemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure.

A recent Supreme Court decision might be thought to undermine our view of the restricted character of the disclosure interest for purposes of exemption 6. *United States Department of Justice v. Tax Analysts*, 109 S. Ct. 2841 (1989), finds that Justice Depart-

ment copies of district court tax decisions are encompassed by FOIA, although admittedly their release "adds nothing whatsoever to public knowledge of government [executive branch] [5] operations," see *id.* at 2854 (Blackmun, J., dissenting). In *Tax Analysts*, however, the Court was not considering any FOIA exemption at all, but was defining statutory phrases such as "agency records." It chose to do so in rather neutral terms, independent of FOIA's overarching purpose. But the Court's privacy "weighing" under exemption 7(C) clearly presents a closer analogy for defining exemption 6 weighing than did the issue at stake in *Tax Analysts*.

Since *Reporters Committee*, we have balanced the disclosure interest in a list of the names and home addresses of retired or disabled federal employees against their privacy interests under exemption 6, and have found the latter predominant. *National Association of Retired Federal Employees v. Horner* ("*NARFE*"), No. 86-5446, slip op. (D.C. Cir. July 7, 1989). Indeed, *NARFE* found the interest in disclosure to be absolute zero. *Id.* at 13. Again we find the balance tilts in favor of privacy.

In analysing the privacy interest in *NARFE*, we considered the nature and scope of the privacy invasions that would flow from disclosure, as inferred from "the characteristic(s) revealed by virtue of being on the particular list." *Id.* at 9. We noted that the list requested would by its nature also disclose that the persons listed were retired or disabled and receiving a monthly annuity check from the federal government. "Any business or fundraising organiza-

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[5] FOIA applies to "agencies," 5 U.S.C. § 552, which are defined to exclude both Congress and the courts of the United States. *Id.* at § 551(1).

tion for which such individuals might be an attractive market could get from the Government, at nominal cost, a list of prime sales prospects to solicit." *Id.* at 7. Cheap access to such lists would expose the annuitants " 'to an unwanted barrage of mailings and personal solicitations,' " *id.* at 8, quoting *Minnis v. Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984). While the financial security of federal annuitants may somewhat exceed that of current federal workers, we doubt that the difference is enough to justify more than a very modest discount of the individuals' privacy interest, which in *NARFE* we characterized as "significant." Slip op. at 12. We note that entrepreneurs have filed FOIA requests for specific names of classes of current government employees in order to aid them in business solicitation. See *Schwaner v. Department of the Air Force*, 698 F. Supp. 4 (D.D.C. 1988), *appeal pending*, No. 88-5341 (D.C. Cir.) (request for names and duty stations of certain ranks of Bolling Air Force personnel for purposes of life insurance solicitation).

On the disclosure side of the balance, again we find *NARFE* only modestly distinguishable. To be sure, the names of current workers might provide leads for an investigative reporter seeking to ferret out what "government is up to." But the same may be said as to the retirees involved in *NARFE*; indeed, recent retirees might sometimes, because of their relative invulnerability to retaliation, be an especially rich source of revelations. Moreover, the zealous investigator has an alternative means of access to current workers that is unavailable as to retirees—face-to-face conversation attained simply by following other leads and roaming government hallways. Concededly, access through home address lists might on occasion

offer the investigator an advantage: a potential witness reached at home might assess the risk of discovery by superiors as less than if reached at work, and accordingly be more candid. While this advantage raises the public interest in disclosure above the "nothing" at which *NARFE* valued the disclosure interest in retirees' names and addresses, we do not find it enough to outweigh the workers' significant interest in privacy.

The remaining question is whether this balance should be adjusted in light of the FLRA's legitimate finding that the Federal Labor Management Relations Act establishes another public interest in disclosure, namely in disclosure to labor unions for collective bargaining purposes. The Act specifically identifies a public interest in public sector collective bargaining, see 5 U.S.C. § 7101(a); *NTEU v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987) (Congress believed that collective bargaining in the federal sphere would contribute to effective running of public business), and the FLRA's determinations here rest on a provision of that Act that expressly calls for disclosure as a means to facilitate that interest, see 5 U.S.C. § 7114 (b)(4). Other circuit courts have invoked these disclosure values in the Privacy Act-FOIA balancing, but they did so without explanation. *Reporters Committee* requires that this reliance on non-FOIA disclosure interests be either explained or abandoned.

Reporters Committee itself stated that "the identity of the requesting party has no bearing on the merits of his or her FOIA request," with the exception of the case where a privacy interest is based on a claim of privilege and the person protected by the privilege seeks the information for himself (giving as an example a FOIA request by the subject of a

presentence report). 109 S. Ct. at 1480. But the statement does not necessarily mean that there is no exception to the general rule that the public interest in disclosure under FOIA should be defined exclusively in terms of finding out what the "government is up to." Nothing in the passage suggests that the Court had considered and rejected the relevance of public interest objectives identified by Congress in other disclosure statutes. Moreover, the argument here is not that the *identity* of the requester should alter the disclosure interest, but rather than a congressional (non-FOIA) disclosure mandate might do so.

On the other hand, the language of the Privacy Act itself is hard to square with such a broad view. Under 5 U.S.C. § 552a(b)(2), disclosure of a personal record, without the consent of the person to whom it pertains, is prohibited "unless disclosure of the record would be . . . required under section 552 of this title [FOIA]." The reading proposed by the Authority would in effect construe this as encompassing disclosures required "under FOIA *or any agency decision based on a disclosure-related statute*." Alternatively, with more nuance but considerably more complication, it might apply to disclosures "required where the disclosure value under FOIA, and under any congresionally authorized agency disclosure decision, in the aggregate outweigh the privacy interest." One can, indeed, imagine numerous variations in which to cast this gloss.

Privacy Act exception b(2) speaks only of FOIA. We do not believe we are entitled to engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process. Consistent with the holding

in *NARFE*, we find that federal employees' have privacy interests in their names and home addresses that must be protected and that the relevant public interest in disclosure, though not nothing, is outweighed.

Thus we turn to the routine use exception of the Privacy Act, an independent ground potentially supporting the FLRA's holding that release of the employees' names and addresses is not prohibited by law.

B. *The Routine Use Exception*

The "routine use" exception to the Privacy Act, 5 U.S.C. § 552a(b)(3), allows disclosue of personnel records

> for a routine use as [1] defined in subsection (a)(7) of this section [5 U.S.C. § 552a(a)(7)] [2] described under subsection (e)(4)(D) of this section [5 U.S.C. § 552a(e)(4)(D)].

The effect of the first constraint is to confine routine use disclosures to ones that are "compatible with the purpose for which [the information] was collected," 5 U.S.C. § 552a(a)(7); the agencies raise no issue on that score. Instead, they question whether the proposed disclosure complies with the requirement that the disclosure fall within the uses "described under" 5 U.S.C. § 552a(e)(4)(D). This provision requires an agency maintaining personnel records to describe in a Federal Register notice "each routine use of the records . . . , including the categories of users and the purpose of such use." The agencies argue that OPM's routine use notice, the only one relied on by the Authority and unions, does not encompass disclosure for the present purposes.

The Office of Personnel Management maintains "Official Personnel Files" that contain federal em-

ployees' names and home addresses. These remain its responsibility even though they are located physically in the government agencies. *Farmers Home Administration*, 23 FLRA at 794. OPM's notice of the routine uses for information from an employees' Official Personnel File provides that the records may be used:

> j. To disclose information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

Privacy Act of 1974: Publication of Notices of Systems of Records and Proposed New Routine Use, 49 Fed. Reg. 36,949, 36,956 (Sept. 20, 1984). The FLRA found that the data sought here was covered by OPM's paragraph j. *Farmers Home Administration*, 23 FLRA at 794.

An agency's interpretation of its own regulations is normally controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977); see also *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986) (agency interpretation of its own regulations given "controlling weight" by the courts). Broad deference makes especially good sense for these interpretations; as the agency has the authority to amend the regulation itself, a court's refusal to defer may simply postpone application of the agency's legitimate view. For purposes of determining the scope of OPM's routine use notice, then, an official OPM interpretation would be entitled to great deference.

Unfortunately, the record here is slightly obscure as to OPM's interpretation. The predecessor agency

to OPM, the Civil Service Commission, issued guidelines to aid agencies in determining whether releases to labor unions were appropriate. *Disclosing Information Covered Under the Freedom of Information Act and the Privacy Act to Labor Organizations recognized Under Executive Orders 11636 and 11491, As Amended*, Federal Personnel Manual, Supplement 711-1, Appendix C (Aug. 10, 1978). The guidelines did not indicate how the existence and adequacy of alternate means of communication should affect the necessity inquiry. In May 1986, the portion of the Manual containing those guidelines was deleted; the subsequent notice of the change indicated that Appendix D of the new chapter was reserved for "material concerning the disclosure of information to labor organizations." Federal Personnel Manual, Table of Changes, Basic Installment 334 (June 24, 1986). Although three years have elapsed since the deletion, OPM has not yet promulgated guidelines concerning disclosure of personnel data to unions. See Federal Personnel Manual, Supplement 711-1 (reserving Appendix D for future guidelines).

Nonetheless, on June 25, 1987 Constance Horner, then the Director of OPM, stated in a letter to Richard Willard, then Assistant Attorney General, that the "current official interpretation of the routine use is set forth in OPM's *Home Addresses Cases amicus* brief to the FLRA dated July 14, 1986 [Brief for Government Agencies, Addendum D], and will remain in effect pending formal revision and issuance of a new guideline." See Brief for Government Agencies, Addendum B. The cited *amicus* brief first provides OPM's interpretation of 5 U.S.C. § 7114(b)(4); it contends that disclosure cannot be "necessary" within the meaning of § 7114(b)(4) if "adequate al-

ternative means exist for contacting [the employees]." *Amicus* Brief at 9. The brief goes on to provide OPM's views as to the meaning of paragraph j of its routine use notice, adopting its previous analysis of § 7114(b)(4). Moreover, because paragraph j has a dual standard of necessity and relevance, the OPM believes that it is more restrictive than § 7114 (b)(4). *Id.* at 20.

Before we decide whether *amicus* brief's interpretation is a reasonable one, we must decide whether we can properly treat it as OPM's official interpretation. Courts have sometimes declined to defer at all to agency counsel's litigative positions. See, e.g., *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (holding that "an *amicus curiae* is no more a witness than any other advocate" and refusing to accept agency counsel's "current litigating position" as authoritative). This court has more cautiously noted that "[t]here is some question . . . whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron* [*v. NRDC*, 467 U.S. 837 (1984)]." *Church of Scientology of California v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987).

But we think that the reasons for courts' scanting such interpretations are altogether absent here. We can identify two basic concerns for reluctance to defer to agency counsel's litigating position. First, the position may not reflect the views of the agency head(s). Judicial reliance on such a position might (in the statutory interpretation context) lock an agency into a view it never espoused. See *Women*

Involved in Farm Economics v. Department of Agriculture ("*WIFE*"), No. 88-5192, slip op. at 10 (D.C. Cir. June 2, 1989). That risk may have been especially acute before *Chevron* made crystal clear that an agency interpreting a statute under an express or implied delegation of authority is free to modify its view. Quite apart from the potential lock-in, an agency informed that its stated reason was inadequate might well reverse field; judicial affirmance on a basis never articulated by the agency could thus produce an unintended result and usurp the agency's function. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). In any event, no such concern exists here. Ms. Horner, the agency head, has explicitly adopted the view of the *amicus* brief. There is no risk that counsel may have acted as "mavericks disembodied from the agency that they represent." *Church of Scientology of California v. IRS*, 792 F.2d at 165 (Silberman, J., concurring).

Second, a position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views. Indeed, where statutes specify procedures for a specific type of decision, one engendered solely in litigation will (typically) have skirted those procedures. *Cf. WIFE*, slip op. at 10-11 (stressing role of statutory obligations to explain actions). Here again we find nothing to justify such a concern. The way in which Director Horner adopted the brief as the official OPM statement seems in no respect to fall short of OPM's usual procedures for interpreting its routine use notice. Guidelines in the Federal Personnel Manual are drafted by OPM staff and approved by the Director, see Federal Personnel Manual, Chapter 711 at § 2-6(1) (June 24,

1986). This seems functionally indistinguishable from the legal staff's preparing the *amicus* brief and Director Horner's officially adopting it in her letter of June 25, 1987. Thus we have no reason to believe that the interpretive process here was any less thorough, less formal or less open than it would normally be. Nor, of course, did the position represent any kind of agency switch. Compare Judge Silberman's concurring opinion in *Church of Scientology*, suggesting that acceptance of an agency counsel articulation of a statutory interpretation is appropriate unless it is inconsistent with a prior administration construction, or there is "no link" between the interpretation and administrative practice, or it is "no more than a 'current litigating position.'" 792 F.2d at 165 (citations omitted). Thus we believe it entirely appropriate to treat Mr. Horner's adoption of the *amicus* brief as an authoritative expression of the agency's views.

We note that this court recently held in *WIFE* that where an agency deve'oped a regulation under an exemption from 5 U.S.C. § 553's requirement of a statement of the rule's "basis and purpose," counsel's explanation of the rule's underlying theory was acceptable—i.e., did not trigger the *Chenery* requirement that action unsupported by a valid *agency* explanation must be remanded for reconsideration. Slip op. at 7-13. Though the case generally supports the view taken here, it is not identical. There the agency *position* had been taken long before counsel's explanation, so the court's ultimate deference in the case was to a pre-litigation stance. On the other hand, in *WIFE*, the sole source of any agency *explanation* of its position was that of counsel in litigation, whereas here counsel and agency head are for-

mally on record expressing the same position and explanation.

Turning to OPM's interpretation of "necessity," we find it quite reasonable. To the extent that alternate means adequately allow the unions to communicate with federal employees, it is reasonable to conclude that it is not "necessary" for the unions to be able to send mail to employees' homes. See *Prudential Insurance Co.*, 412 F.2d at 85-87 (Friendly, J., dissenting) (in view of alternate methods of communication, release of names and home addresses was not a "necessity for union organization and representation"). Although it may seem anomalous that the FLRA and OPM interpret such similar language differently (especially as both § 7114(b)(4) and paragraph j evolved from language developed by the Authority's institutional predecessor, the Federal Labor Relations Council), we cannot require conformity as long as both interpretations are reasonable.

Thus paragraph j of OPM's routine use notice, as explained by the *amicus* brief, does not authorize the release of employees' names and home addresses to unions without some showing that the alternate means of communication are insufficient. In the absence of any such showing here, we set aside the FLRA's determinations that the routine use exception of the Privacy Act applies.

* * *

At oral argument and in supplemental briefing, the union in the case concerning the Social Security Administration argued that the agency was collaterally estopped from defending itself on the merits before this court because of the Second Circuit's decision in *AFGE v. FLRA*, 786 F.2d 554 (2d Cir. 1986). We

find collateral estoppel inappropriate here because there has been "a change or development in the controlling legal principles," namely the Supreme's Court's decision in *Reporters Committee*, that has rendered the first determination "obsolete or erroneous, at least for future purposes." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599 (1948); see also *Graphic Communications International Union v. Salem-Gravure Division of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) ("issue preclusion does not apply when there has been an intervening change in legal principles").

* * *

We defer to the FLRA's view that disclosure of employees' name and home addresses are "necessary" for purposes of collective bargaining under § 7114 (b)(4) of the Federal Labor Management Relations Act. Nevertheless, we must set aside its decisions because release of that information would violate the Privacy Act. We find that neither the Act's exception for disclosure required by FOIA nor its exception for disclosure pursuant to a routine use notice is applicable in these cases. We deny the Authority's applications for enforcement and grant the government agencies' petitions for review.

So ordered.

GINSBURG, RUTH B., *Circuit Judge, concurring*: In common with our sister circuits, I believe it unlikely that Congress intended to deny to unions serving employees in the public sector lists of names and addresses of bargaining unit workers of a kind routinely supplied, under prevailing law, to unions serving employees in the private sector. However, the logic of the court's opinion is irreproachable. The broad cross-reference in 5 U.S.C. § 7114(b)(4)—"to the extent not prohibited by law"—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act (FOIA).

Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public. True, unions have a special interest in identifying and communicating with persons in the bargaining unit, an interest intially accommodated by 5 U.S.C. § 7114(b)(4). The bargaining process facilitation interest is ultimately unavailing, however, because it "falls outside the ambit of the public interest that the FOIA was enacted to serve," *i.e.*, the interest in advancing "public understanding of the operation or activities of the government." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468, 1482-83 (1989).

The disadvantage at which unions operating in the public sector are placed in comparison to unions in the private sector, if the former lack access to the lists sought here, suggests the need for a second look. Had the Supreme Court envisioned this case, would it

have qualified *Reporters Committee*'s statement of the public interest relevant under the FOIA? Informed of the consequences of the Federal Labor Relations Statute's broad cross reference, would Congress opt to provide bargaining representatives in the public sector with the names and addresses of unit employees? These are questions now ripe for consideration by the appropriate lawmaking or precedent-setting authorities.

Every circuit that considered the bargaining unit name and address list issue prior to *Reporters Committee* reached a result in conflict with the disposition we announce today.[1] Those circuits were mindful of the congressional recognition that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a) (1982); they sought to avoid discrepancies in the treatment of public and private sector unions dissonant with federal labor relations policy. Noteworthy too, the ruling that *Reporters Committee* impels this court to make appears an anomaly when compared with *United States Dep't of Justice v. Tax Analysts*, 109 S. Ct. 2841 (1989), the Supreme Court's most recent pronouncement on the FOIA. Most significantly, as our sister circuits' analyses indicate, there is at stake here no more than a modest privacy interest, one outbalanced by a broader view of the public interest than *Reporters Committee* permits.

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[1] *See* United States Dep't of the Navy v. FLRA, 840 F.2d 1131 (3d Cir.), *cert. denied*, 109 S. Ct. 632 (1988); United States Dep't of the Air Force v. FLRA, 838 F.2d 229 (7th Cir.), *cert. denied*, 109 S. Ct. 632 (1988); United States Dep't of Agriculture v. FLRA, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989); United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129 (4th Cir. 1987); AFGE, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986).

I.

Private sector employers are required under current law to provide unions with bargaining unit employees' names and addresses. *See NLRB v. Associated Gen'l Contractors*, 633 F.2d 766, 773 (9th Cir. 1980) (disclosure required under 29 U.S.C. § 158(a)(5)'s duty to bargain in good faith); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975) (same); *United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1204 (2d Cir. 1970) (same), *cert. denied*, 401 U.S. 993 (1971); *Prudential Ins. Co. of Am. v. NLRB*, 412 F.2d 77 (2d Cir.) (same), *cert. denied*, 396 U.S. 928 (1969); *Standard Oil Co. v. NLRB*, 399 F.2d 639, 640 (9th Cir. 1968) (same); *cf. NLRB v. Wyman-Gordon*, 394 U.S. 759, 767 (1969) (employer must provide candidate unions with names and addresses prior to election of bargaining representative). *But see Prudential*, 412 F.2d at 85-86 (Friendly, C.J., dissenting) (because alternative means of communication are adequate though not ideal, 29 U.S.C. § 158(a)(5) does not require disclosure); *cf. Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972) (disclosure not required where there was prior harassment of nonstriking workers and employer offered to give list of independent mailing agency for use in union mailings).

Private sector labor-relations case law, although not strictly binding as precedent, generally provides strong guidance in parallel public sector matters. *See NTEU v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983); *see also United States Dep't of the Navy v. FLRA*, 840 F.2d 1131, 1138 (3d Cir.), *cert. denied*, 109 S.Ct. 632 (1988); *United States Dep't of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1132 (4th Cir. 1987). This is so

because Congress modeled the Federal Labor Relations Statute (FLRS) on the Labor Management Relations Act (LMRA);[2] in the drafting process, the legislators paid close attention to judicial decisions in private sector labor law cases. *See NTEU*, 810 F.2d at 299. The two statutes present similar definitions of collective bargaining and serve similar purposes. *See United States Dep't of Health & Human Servs.*, 833 F.2d at 1132. Tellingly, the opening section of the FLRS states: "[E]xperience *in both private and public sector employment* indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing . . . *safeguards the public interest.*" 5 U.S.C. § 7101(a)(1) (1982) (emphasis added). No policy concern Congress identified warrants different treatment of unions in the private and public sectors for the purpose at hand. *See United States Dep't of Health & Human Servs.*, 833 F.2d at 1132.

It bears emphasis that Congress has explicitly directed each public sector union to "represent[] the interests of all employees in the [bargaining] unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1) (1982). Effective communication on workplace and work-related issues—for example, impending workforce reductions and available labor protections—is surely facilitated by home mailings. Other means of union-worker communication—such as

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[2] "In passing the [FLRS]," the Supreme Court observed, "Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest . . . ." **Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107 (1983).**

worksite, visits, meetings, and newsletter distributions at the workplace—do not afford the same comprehensive coverage. Again, as other circuits have said,[3] the public interest in the bargaining representative's ready access to unit employees appears no less vital in federal employment than in private employment. It thus seems to me nearly certain that Congress did not anticipate the outcome *Reporters Committee* requires us to reach in this case.

II.

Set against the outcome in *Tax Analysts*, the Supreme Court's most recent interpretation of the FOIA, the holding that the Information Act blocks public sector unions from access to federal employees' names and addresses becomes all the more anomalous. *Tax Analysts* held that the FOIA requires the Department of Justice to release its compilations of district court tax decisions to the publishers of *Tax Notes*, a weekly magazine. *See* 109 S. Ct. at 2853. Justice Blackmun centered his dissent on the point that release of the requested court orders and opinions "adds nothing whatsoever to public knowledge of government operations." *See id.* at 2854 (Blackmun, J., dissenting).

As the court's opinion in the instant case correctly points out, no privacy exemption militated against disclosure in *Tax Analysts*. *See* Ct. Op. at 10-11.[4]

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[3] *See United States Dep't of the Navy*, 840 F.2d at 1136-37; *United States Dep't of the Air Force*, 838 F.2d at 233; *United States Dep't of Agriculture*, 836 F.2d at 1142; *United States Dep't of Health & Human Servs.*, 833 F.2d at 1132; *AFGE, Local 1760*, 786 F.2d at 557.

[4] As the court's opinion explains, the ruling in *Tax Analysts* —that the FOIA calls for disclosure of records that do not advance public knowledge of "what government is up to"—

Nonetheless, the juxtaposition of *Tax Analysts* and our decision today reveals a tension in the Supreme Court's interpretation of the FOIA: the Information Act, in the first instance, demands no showing at all of "public interest"; yet, once a privacy interest, however modest, is implicated, the Act forbids disclosure of information that advances a significant public interest (here, the interest in informed collective bargaining), if that interest is unrelated to FOIA's "core purpose." *See Reporters Committee*, 109 S. Ct. at 1483. It is not plausible that Congress intended the FOIA to reduce the cost of publishing enterprises like *Tax Notes*, but to disarm bargaining representatives operating in the public sector.

III.

Perhaps the most persuasive indication that neither Congress nor the Supreme Court anticipated the outcome in this case is that the balance between the public interest in disclosure and the individual interests in privacy, when viewed unfiltered by the lens of *Reporters Committee*, overwhelmingly favors disclosure. First, the privacy interests threatened by release of the names and addresses of bargaining unit employees, while not insignificant, are far less compelling than those in *Reporters Committee* and in other cases where disclosure has been disallowed. Most circuits have concluded that privacy interests in names and addresses alone are "not particularly compelling." *AFGE, Local 1760 v. FLRA*, 786 F.2d 554, 556 (2d Cir. 1986); *see also NARFE v. Horner*, No. 86-5446, slip op. at 13 (D.C. Cir. July 7, 1989) ("modest" but enough to prevent disclosure absent any cognizable public interest); *United States Dep't*

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does not reach back to modify *Reporters Committee*'s restriction on the public interest cognizable in privacy exemption balancing.

of the Navy, 840 F.2d at 1137 (3d Cir.) ("minimal"); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir. 1988) ("minuscule"), *cert. denied*, 109 S. Ct. 632 (1988); *United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988) (agreeing that "average employee's privacy interest in his home address is not particularly compelling," but observing that "not all employees are average," and therefore ordering disclosure of names and addresses unless employee requests that information be kept confidential), *vacated and remanded*, 109 S. Ct. 831 (1989); *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65, 69 (1st Cir. 1981) (intrusion so "limited" that exemption 6 balancing not even triggered); *Ditlow v. Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) ("less than a substantial invasion of privacy"). *But compare AFGE Local 1923 v. United States Dep't of Health & Human Servs.*, 712 F.2d 931, 932 (4th Cir. 1983) ("strong privacy interest") *with United States Dep't of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987) (noting that issue whether employees have "a strong privacy interest" in their home addresses is a "close one" and citing dissent of Winter, C.J., in *AFGE Local 1923*, 712 F.2d at 934 (maintaining that "there is little privacy in one's name and home address")).

In all but one of the circuit decisions that have found privacy interests in names and addresses sufficient to bar disclosure, the requested data would have conveyed further information ~~of a~~ more revealing and commercially valuable character.[5] *See*

[5] The one exception was AFGE Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931 (4th Cir. 1983). In United States Dep't of Health & Human Servs. v.

NARFE, slip op. at 7 (list indicated that individuals were retired or disabled and received an annuity); *Aronson v. United States Dep't of Housing & Urban Dev't*, 822 F.2d 182, 186 (1st Cir. 1987) (list revealed that individuals owed substantial sums); *Minnis v. United States Dep't of Agriculture*, 737 F.2d 784, 787 (9th Cir.) (list revealed individuals' interests in water sports and the out-of-doors), *cert. denied*, 471 U.S. 1053 (1985); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 528 (6th Cir. (requester sought listing of loan amounts), *cert. denied*, 469 U.S. 1034 (1984); *Committee on Masonic Homes of R.W. Grand Lodge v. NLRB*, 556 F.2d 214, 220 (3d Cir. 1977) (information indicated union preference and contained thumbnail sketch of job classification and status); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974) (list revealed family status and interest in wine-making). Here the list would reveal nothing more than the name, address, and bargaining unit of each individual. The list would lump together employees of a variety of grade and pay levels and disclose no additional, personal information that might be embarrassing or enhance the value of the list for solicitation purposes.

The privacy invasion threatened by release of the bare names and addresses in this case pales in comparison to the privacy invasion threatened by release of the rap sheet in *Reporters Committee*. An indidvdual's mailing address, unlike the scattered bits of

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FLRA, 833 F.2d 1129 (4th Cir. 1987), the same circuit distinguished *AFGE Local 1923* as arising under the FOIA alone rather than under the FOIA through 5 U.S.C. § 7114(b) and cited the dissent of Winter, C.J., in *AFGE Local 1923* with approval. *See* 833 F.2d at 1135 n.8.

information relevant to criminal matters compiled in a rap sheet, has no pejorative connotations. The local phone book prints names and addresses for most permanent residents of a community. In contrast, the rap sheet at issue in *Reporters Committee* contained a collection of information not "freely available" information "hard-to-obtain," indeed impossible to amass without "diligent search of courthouse files, county archives, and local police stations throughout the country." *See Reporters Committee*, 109 S. Ct. at 1477.

Furthermore, the Supreme Court emphasized in *Reporters Committee* "the web of federal statutory and regulatory provisions that limit the disclosure of rap-sheet information." *Id.* Again in conspicuous contrast, 5 U.S.C. § 7114(b)(4) indicates Congress' understanding that employees have a reduced expectation of privacy regarding information that facilitates collective bargaining. In fact, unions have obtained far more personal information under section 7114(b)(4) than the names and addresses at issue here. Examples include performance appraisals and disciplinary records. *See, e.g., AFGE v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records); *Internal Revenue Service and NTEU*, 25 F.L.R.A. (No. 13) 181 (1987) (performance appraisal). Indeed, one of the unions in the cases consolidated in this review proceeding has already obtained employee salary information. *See* Joint Appendix at 116.

Finally, in comparing the lesser privacy invasion involved in this case to the large one at stake in *Reporters Committee*, one might note that this case presents a question under exemption 6 rather than exemption 7(C). The Supreme Court observed in *Reporters Committee* that exemption 6 differs from exemption 7(C) in two key ways. First, to fall

within exemption 6, the invasion of privacy must be "clearly" unwarranted; the adverb "clearly" is omitted from exemption 7(C). Second, exemption 6 prohibits only disclosures that "would constitute" an invasion of privacy while exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. *See Reporters Committee*, 109 S. Ct. at 1472-73.[6]

As the court's opinion in this case states, these textual differences concern only the privacy side of the balance; they do not justify our consideration of a broader range of public interests under exemption 6. *See* Ct. Op. at 10. However, they do make the point that the privacy claim before us is of a relatively lower value in the FOIA's calculus.

Turning to the public interest side of the balance, the force of the FLRA's position, as affirmed by circuit court precedent until now uniform, is evident. *See supra* pp. 2-4. To recapitulate, it seems to me ironic that the FLRS, a measure unquestionably designed to arm federal unions with capacity closer to that of unions in the private sector, must be interpreted to diminish the access of federal employees' unions to workers in the bargaining unit.

CONCLUSION

For the reasons stated, and with the suggestion that this issue merits consideration by decisionmakers equipped to clarify section 7114(b)(4) or to qualify *Reporters Committee*, I reluctantly concur in the court's opinion and judgment.

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[6] *See* NARFE v. Horner, No. 86-5446, slip op. at 10 (D.C. Cir. July 7, 1989) (describing as exemption 6 threshold, proof of "a substantial probability," *i.e.*, "little reason to doubt," "that disclosure will cause an interference with personal privacy").

SENTELLE, *Circuit Judge*, concurring: I completely concur in the Court's conclusion in this case and find the Court's reasoning to be wholly sound on all points concerning the question addressed in Part II of the opinion. I write separately only to express certain misgivings as to Part I.

I question whether the FLRA interpretation of 5 U.S.C. § 7114(b)(4) (1982) is one to which we should defer. The FLRA interpretation upholds the Unions' view that the names and home addresses of agency employees are included within the statutory mandate requiring agencies

> to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining . . . .

Id. § 7114(b)(4)(B).

The statute does not require the agencies to provide the exclusive representative with all information useful to its union activities, but only data that are "reasonably available and *necessary for full and proper discussion, understanding, and negotiation within the scope of collective bargaining.*" *Id.* (emphasis added). The FLRA's discretion to define the terms within section 7114(b)(4) is far from unbridled. "Collective bargaining" is defined by Congress as

> the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a

> good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession . . . .

5 U.S.C. § 7103(a)(12) (1982). The Authority's construction of the Agency's obligations under section 7114(b)(4) appears to be outside the confines of the discretion left to the Authority after the erection of the statutory definitional wall. The names and home addresses of employees are no doubt useful to the Unions in their other representational activities and in recruitment. (*Cf. Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 86 (2d Cir. 1969) (Friendly, J., dissenting) (arguing that recruitment is the true goal of private sector unions seeking employee names and addresses). However, section 7114(b)(4) only mandates the furnishing of data necessary to the collective bargaining purpose as defined in section 7103(a)(12). There is no such mandate for data necessary to the Unions' other concededly useful and even commendable purposes. The deference to Agency construction mandated in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), rests on the underpinning that Congress, by leaving a gap for the Agency to fill, has made a "delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *id.* at 843-44. Because Congress, in the legislation under review, itself walled-in the gap and excluded to an extent the FLRA from its present construction of the

statute, the FLRA's construction approaches the limits of the zone in which we owe it *Chevron* deference.

As the Court's opinion recites, however, the weight of authority heavily supports the road taken by the Court in upholding the FLRA's decision, and I join, if somewhat reluctantly, my colleague's opinion on this point. I reiterate that I find the Court's reasoning in Part II to be sound and convincing, and its conclusion wholly correct.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1107

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

U.S. DEPARTMENT OF THE TREASURY, FINANCIAL MANAGEMENT SERVICE, RESPONDENT

Before: R.B. Ginsburg, Williams and Sentelle, Circuit Judges

ORDER

[Filed Sep. 13, 1989]

It is ORDERED, by the Court, *sua sponte*, that the opinion in the above-captioned case issued on September 12, 1989 is amended as follows:

At Page 10, line 4:

insert the word "the" after "opened to"

FOR THE COURT:
CONSTANCE L. DUPRE,
Clerk

By: /s/ John Haley
JOHN HALEY
Deputy Clerk

APPENDIX C

25 FLRA No. 42

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 3-CA-60380

DEPARTMENT OF THE TREASURY FINANCIAL MANAGEMENT SERVICE, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION, CHARGING PARTY

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, granting the General Counsel's motion for summary judgment and finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that Respondent be ordered to take appropriate remedial action. Thereafter, the Respondent filed exceptions to the Judge's Decision and a supporting brief. No opposition to the exceptions was filed.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Fed-

eral Service Labor-Management Relations Statute (the Statute), we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision, the exceptions, and the entire record, we adopt the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Treasury, Financial Management Service shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the National Treasury Employees Union, the exclusive representative of its employees, or its Chapter 202, the names and home addresses of all bargaining unit employees of the Financial Management Service.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the names and home addresses of all unit employees as requested by the National Treasury Employees Union, Chapter 202, by its letter of April 29, 1986.

(b) Post at all of its facilities where bargaining unit employees represented by the National Treasury Employees Union are located, including its national Headquarters and Financial Center, Washington, D.C. and at its Regional Financial Centers, copies of

the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Financial Management Service and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., February 5, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN,
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III,
Member

/s/ Jean McKee
JEAN MCKEE,
Member

FEDERAL LABOR RELATIONS
AUTHORITY

NOTICE TO ALL EMPLOYEES
AS ORDERED BY THE
FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF
THE FEDERAL SERVICE LABOR-
MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES
THAT:

WE WILL NOT refuse to furnish, upon request of the National Treasury Employees Union, the exclusive representative of our employees, or its Chapter 202, the names and home addresses of all bargaining unit employees of the Financial Management Service.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Statute.

WE WILL furnish the names and home addresses of all unit employees as requested by the National Treasury Employees Union, Chapter 202, by its letter of April 29, 1986.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, N.W., 7th Floor (or P.O. Box 33758), Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

Case No. 3-CA-60380

DEPARTMENT OF THE TREASURY FINANCIAL MANAGEMENT SERVICE, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION, CHARGING PARTY

Arthur S. Rosenzweig, Esquire
For the Respondent

Ira Sandron, Esquire
For the General Counsel

Bryan W. Mellor, Esquire
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.*,

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* For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, *e.g.*, Section 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)".

and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, concerns a request for the names and home addresses of bargaining unit employees.

This case was initiated by a charge filed on June 12, 1986 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1) and (8) of the Statute and a first amended charge filed on August 15, 1986 (G.C. Exh. 1(b)), which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on August 26, 1986 (G.C. Exh. 1(c)), alleged violations of §§ 16(a)(1), (5) and (8) of the Statute, and set the hearing for November 5, 1986, pursuant to which a hearing was duly held on November 5, 1986, in Washington, D.C., before the undersigned. At the conclusion of the testimony and evidence, I granted the motion of General Counsel for summary judgment. All parties were given leave to mail briefs, in support of the granting of summary judgment or in opposition thereto, on or before November 19, 1986. No post-hearing briefs were filed. On the basis of the entire record, I make the following findings and conclusions:

Findings

1. The National Treasury Employees Union (NTEU) is the exclusive representative of Respondent's employees in a nation-wide consolidated unit consisting of all of Respondent's nonprofessional General Schedule and Wage Grade employees. NTEU's Chapter 202 (hereinafter referred to as the "Union") is the agent of NTEU acting upon its behalf in representing bargaining unit employees.

2. On, or about April 29, 1986, the Union requested that Respondent furnish it with the names

and home addresses of ". . . all bargaining unit employees in FMS" (G.C. Exh. 3), and stated that, "The purpose of this request is for the Union to have an opportunity to reach all of our employees regardless of restricted or security areas they may work in." (G.C. Exh. 3).

3. By letter dated May 5, 1986, Respondent refused to furnish the Union the names and home addresses requested stating,

> "This is in response to your April 29, 1986 letter asking for the names and mailing addresses of all bargaining unit employees. A recent FLRA decision on this very issue held that the Unions are not normally entitled to this information. The Authority balanced the rights of exclusive bargaining representative and the privacy rights of the employees. It concluded that as long as there were other reasonably effective means of contacting the employees, the Union was not entitled to this information. Accordingly, I must deny your request.
>
> "Management is interested in cooperating with NTEU to the extent permitted by law. Therefore, if you are unable to contact any FMS employee bargaining unit employee because that person is either assigned to a remote work site or absent for an extended period, please contact a Labor Relations Specialist for assistance in either locating that employee or forwarding documents to that person." (G.C. Exh. 4).

4. The parties stipulated as follows:

> "The information requested by the Union, described in Paragraph 6 of the Complaint, is normally maintained by Respondent, based on

information supplied by bargaining unit employees, in the regular course of business, is reasonably available and does not constitute guidance, advice, counsel, or training for management officials, or supervisors relating to collective bargaining." (Tr. 8; see, also, Respondent's Answer, G.C. Exh. 1(e)).

5. Mr. Clinton Weems, President of Chapter 202 and who made the request for names and home addresses, testified there was no correspondence between the Union and Respondent other than General Counsel Exhibits 3 and 4 (Tr. 7); that he had no conversations bearing on the purpose of his request with Respondent (Tr. 17-18); and that Respondent never asked why he wanted the information (Tr. 18).

6. Ms. Virginia Gaye Cook, Labor Relations Officer for the Financial Management Service (Tr. 23), testified that the Financial Management Service consists of Headquarters and seven regional financial centers; that there is a single nationwide bargaining unit represented by NTEU; that in the headquarters area in Washington there are six different locations, including the Treasury Annex, Hyattsville, Maryland (where most of its employees are located), the Shoreham Building, the Premier Building, and supplies at the Ford plant in Alexandria, Virginia (Tr. 38); and that there are about 2400 employees in Financial Management Service, not all of whom are in the bargaining unit (Tr. 29). Ms. Cook testified that, to her knowledge, no Union official had ever complained about trouble in contacting bargaining unit employees (Tr. 28). General Counsel's objection to questions directed to Ms. Cook concerning what methods the Union has employed to communicate with bargaining unit employees was sustained; Respondent was per-

mitted to make a proffer of proof, to the effect that the contract of the parties provides various methods of contact, including official time for Union officials to meet with employees, permitting use of bulletin boards, desk drops, "take-one" distribution in the cafeteria area, that Respondent has provided names, location and office telephone numbers of employees, and that these methods are reasonable and effective (Tr. 31-32, 33). General Counsel objected to Respondent's proffers of proof and they were rejected.

Conclusion

Respondent concedes that the facts are not in dispute and stated,

> ". . . The operative facts concerning the complaint are not in issue, the Union submitted a formal request for the names and home addresses of FMS employees and management refusal to provide it to them." (Tr. 22).

Respondent's position is, as quite succinctly stated by Mr. Rosenzweig,

> ". . . the information requested by the Union was not necessary for a full and proper discussion understanding and negotiation of subjects within the scope of collective bargaining . . . that NTEU has represented FMS for several years and has never complained to management about difficulty with contacting employees, or about being constrained in the type of contacts it has . . . that reasonable and effective alternative means exist to contact employees without invading their privacy. . . We urge the Authority to consider the alternative means available to the Union and

then to apply the appropriate balancing test." (Tr. 22-23).

The Authority's decision in *Farmers Home Administration, Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (October 31, 1986) (G.C. Exh. 2) is both controlling and dispositive of Respondent's contentions. Thus, the Authority held, in part, as follows:

> "On balance, we find that the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses. Disclosure of the requested information would not constitute a clearly unwarranted invasion of personal privacy and does not fall within the (b)(6) exemption to the FOIA. Since the information does not fall within the exemption, its disclosure is required under the FOIA and, under exception (b)(2) to the Privacy Act, its release is not prohibited by law. (23 FLRA No. 101 at p. 6).
>
> . . .
>
> ". . . we conclude that the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations. Consistent with that conclusion, we find that the disclosure of the information sought here falls within the routine use established by OPM, and its disclosure is therefore a routine use under exception (b)(3) of the Privacy Act. Therefore, even if the disclosure was not author-

ized under exception (b) (2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b) (3).

"Release of the requested information is therefore not prohibited by law. It may be released pursuant to exceptions (b) (2) and (3) of the Privacy Act. (23 FLRA No. 101 at p. 7).

". . . We find that the statutory requirement concerning sufficiency of a request under section 7114(b) (4) is satisfied for requests such as that involved here when a general written request for information is made. A precise explication of the reasons for the request involved here is not necessary . . . an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union, of its reasons for seeking the information. (23 FLRA No. 101, at p. 8).

. . .

"We will not review the adequacy of alternative methods of communication on a case-by-case basis . . . we find that the mere existence of alternative means of communication is insufficient to justify a refusal to release the information. Further, we find that it is not necessary for us to examine the adequacy of alternative means in cases involving requests for names and home addresses because the communication between the

unit employees and their exclusive representative which would be facilitated by the release of names and home addresses information is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. We find the names and home addresses of unit employees are necessary and should be provided whether or not alternative means of communication are available." (23 FLRA No. 101, at pp. 9-10).

Respondent was required to furnish the names and home addresses requested by the Union, which were normally maintained by Respondent in the regular course of business and were reasonably available, without regard to whether alternative means of communication were available or adequate. Respondent's refusal to furnish the requested information violated §§ 16(a)(1), (5) and (8) of the Statute; the granting of General Counsel's motion for summary judgment at the conclusion of the hearing is affirmed; and it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. 7118, the Authority hereby orders that Department of the Treasury, Financial Management Service shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of National Treasury Employees Union, the exclusive representative of its employees, and its Chapter 202, the names and home addresses of all bargaining unit employees in Financial Management Service.

(2) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Furnish the names and home addresses as requested by the National Treasury Employees Union's Chapter 202 by its letter of April 29, 1986.

(b) Post at all of its facilities where bargaining unit employees represented by the National Treasury Employees Union, including its National Headquarters and Financial Center, Washington, D.C. and at its Regional Financial Centers, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Financial Management Service and shall be posted and

maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, 1111 18th Street, N.W., P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

/s/ William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 26, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY AND IN ORDER TO EFFECTUATE THE POLICIES OF CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the National Treasury Employees Union, the exclusive representative of our employees, the names and home addresses of all bargaining unit employees in the Financial Management Service.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the names and home addresses as requested by the National Treasury Employees Union's Chapter 202 by its letter of April 29, 1986.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

APPENDIX D

25 FLRA No. 67

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 5-CA-60268

DEPARTMENT OF HEALTH AND HUMAN SERVICES SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND AND SOCIAL SECURITY ADMINISTRATION, GREAT LAKES PROGRAM SERVICE CENTER, CHICAGO, ILLINOIS, RESPONDENT

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CHARGING PARTY

DECISION AND ORDER

I. *Statement of the Case*

This matter is before the Authority under section 2429.1(a) of the Authority's Rules and Regulations based on a stipulation of facts by the parties who have agreed that no material issue of fact exists. The General Counsel, the Charging Party (Union), and the Respondent have filed briefs with the Authority.

The complaint alleges that the Respondent violated section 7116(a)(1), (5) and (8) of the Fed-

eral Service Labor-Management Relations Statute (the Statute) by refusing to provide the Union with the names and home addresses of all bargaining unit employees located at 600 W. Madison and 165 N. Canal Street, Chicago, Illinois. The Union's request was made pursuant to section 7114(b)(4) of the Statute. The Respondent, relying in part on the Authority's decision in *Farmers Home Administration, Finance Office*, 19 FLRA No. 21 (1985), denied the Union's request. The Respondent asserted that the employees' privacy interests in their home addresses outweighed the Union's need to communicate with them and that disclosure of the requested information would violate the Privacy Act. The Respondent also asserted that the Union had adequate alternative means available for communicating with the employees and that management was not convinced that the Union had attempted to effectively use all of those alternatives.

II. *Position of the Parties*

In its brief to the Authority, the Respondent repeated its reasons noted above for its denial of the Union's request. Both the General Counsel and the Union argued in opposition to the Respondent's position.

III. *Analysis and Conclusions*

In our Decision and Order on Remand, in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (1986) (*FHAFO*), we reviewed the Authority's previous decision, cited by the Respondent, concerning the release of the names and home addresses of bargaining unit employees to

exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in *FHAFO*, we find that the Respondent was required to furnish the Union with the home addresses of the employees in the bargaining unit. Further, we find that the home addresses of the unit employees are reasonably available to the Respondent and that it would not place an undue burden on the Respondent to provide the Union with the information requested. Finally, we conclude that Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

IV. *Order*

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, the names and home addresses of all bar-

gaining unit employees located at its 600 W. Madison, Great Lakes Program Service Center, Chicago, Illinois facility and at its 165 N. Canal Street, Chicago, Illinois facility.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, furnish it with the names and home addresses of all bargaining unit employees located at its 600 W. Madison, Great Lakes Program Service Center, Chicago, Illinois facility and at its 165 N. Canal Street, Chicago, Illinois facility.

(b) Post at all its facilities at the Great Lakes Program Service Center and at 165 N. Canal Street, Chicago, Illinois, where bargaining-unit employees represented by the American Federation of Government Employees, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., February 20, 1987.

/s/ J. Calhoun
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
AS ORDERED BY THE FEDEARL LABOR
RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF
THE FEDERAL SERVICE LABOR-
MANAGEMENT RELATIONS STATUTE
WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, the names and home addresses of all bargaining unit employees located at our 600 W. Madison, Great Lakes Region Service Center, Chicago, Illinois facility and at our 165 N. Canal Street, Chicago, Illinois facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured them by the Federal Service Labor-Managment Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, furnish it with the names and home addresses of all bargaining unit employees located at our 600 W. Madison, Great Lakes Program Service Center, Chicago, Illinois facility and at our 165 N. Canal Street, Chicago, Illinois facility.

_____

(Activity)

Dated: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604 and whose telephone number is: (312) 353-6306.

APPENDIX E

24 FLRA No. 27

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 1-CA-40290

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE, RESPONDENT

and

FEDERAL EMPLOYEES METAL TRADES COUNCIL,
AFL-CIO, CHARGING PARTY

DECISION AND ORDER

I. *Statement of the Case*

This unfair labor practice case is before the Authority on exceptions filed by the Respondent (Agency). The General Counsel filed an opposition to the exceptions. The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent to refuse a request, made pursuant to section 7114 (b) (4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the union exclusively represents.

In a recent Decision and Order on Remand, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (1986) (*FHAFO*), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in *FHAFO*, we conclude that Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. *Facts*

The Union requested the names and home addresses of the unit employees it represents. The Respondent denied the request on the ground that the information sought was not available under the Statute or the parties' negotiated agreement. The Respondent also contended that the information was not subject to disclosure under the provisions of the Privacy Act.[1]

III. *Administrative Law Judge's Decision*

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1),

[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

(5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. In reaching this conclusion, the Judge found that the home addresses were necessary and relevant within the meaning of section 7114(b)(4) of the Statute for the Union to carry out its representational obligations; that the alternative means of communicating with unit employees which were available to the Union were not effective; that the disclosure of home addresses was not prohibited by law or regulation; and that the Union's need for home addresses in order to effectively communicate with the employees it represents outweighed the minimal intrusion on employee privacy rights which would result.

IV. *Positions of the Parties*

The positions of the parties are set forth in the Respondent's exceptions and the General Counsel's opposition.[2]

In its exceptions, the Respondent essentially disagrees with the Judge's findings and conclusions and asserts that it was not obligated to furnish the requested information to the Union.

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[2] When the Authority decided, for reasons discussed more fully in *FHAFO*, to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit *amicus* briefs addressing the issue, this case was one of those listed as being under consideration. While the parties in this case did not submit *amicus* briefs, the Department of the Navy and the Metal Trades Department of the AFL-CIO did file *amicus* briefs outlining their positions.

In its opposition, the General Counsel argues that the Judge's findings and conclusions are supported by a preponderence of the evidence and are consistent with law. The General Counsel therefore urges the Authority to adopt the Judge's decision in its entirety.

V. *Analysis and Conclusion*

As noted above, the Authority in the decision on remand in *FHAFO* concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of these employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on our decision on remand in the *FHAFO* case and in agreement with the Judge in this case, we find that the Respondent was required to furnish the Union with the names and home addresses of the employees in the bargaining unit. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case was in violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of the Navy, Portsmouth Naval Shipyard, Porstmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of its employees, furnish it with the names and home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the Federal Employees Metal Trades Council, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 26, 1986.

/s/ Jerry L. Calhoun,
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO
EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT
RELATIONS
WE HEREBY NOTIFY OUR
EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116 and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

Case No.: 1-CA-40290

DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD (PORTSMOUTH, NEW HAMPSHIRE), RESPONDENT

and

FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO, CHARGING PARTY

Mr. Thomas F. Wood
Mr. Richard H. Greenberg
For the Respondent

Mr. Stephen Perry
For the Charging Party

Marilyn H. Zuckerman, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massa-

chusetts against the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (Respondent), based on an amended charge filed by the Federal Employees Metal Trades Council, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (the Statute), by refusing to furnish to the Union the names and addresses of bargaining unit employees represented by the Union.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, Charging Party, and the charge, but denied that the requested information fell within the scope of section 7114(b)(4) of the Statute and that it had violated the Statute.

A hearing was held in Portsmouth, New Hampshire. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel, FLRA filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material, the Union has been recognized as the exclusive representative of an appropriate unit of Respondent's employees. The current collective bargaining agreement between the parties became effective October 15, 1981.

The Request and the Answer

By letter dated May 17, 1984, the Union requested that the Respondent furnish it with "a complete listing of all unit employees and their telephone numbers and current addresses."[1] Both prior to and subsequent to the request, Union representatives advised management that the information was necessary in order to represent all unit employees. Union representatives explained that the Union needed the information in order to contact unit employees with active grievances who were on leave at their homes regarding the processing of their grievances. The Union also wanted to send all unit employees a monthly Union newsletter which would "explain general employee benefits, offer insurance premium which aren't offered by the Federal Government, et cetera."

By letter dated May 24, 1984 Respondent formally replied to the request. The letter stated, in part, as follows:

> The telephone numbers and current addresses of unit employees is not information available under the provisions of the Federal Service Labor-Management Relations Statute or the current Agreement between the parties. Furthermore, that information is not subject to disclosure under the provisions of the Privacy Act of 1974.
>
> At the present time, your organization receives a semi-annual eligibility listing of all unit employees. Current addresses and telephone num-

[1] The Union has withdrawn its request for the home telephone numbers.

bers may be requested from individual employees during non-duty hours; however, the employees are under no obligation to release such information.

Availability of Employee Addresses

Respondent maintains the home addresses of employee's in official personnel folders and on Roladex circular files in the shops and main office. Such information, along with other personnel information, is secured at night in locked cabinets or offices. Access to home addresses and telephone numbers is limited and strictly enforced. Some employees have from time to time expressed concern to personnel employees that individuals "that had no business getting it would have access to their personal information." They have been assured that names and home addresses would only be released to persons who have a need to know on an official basis.

Chapter 294 of the Federal Personnel Manual (FPM) sets forth the instructions of the Office of Personnel Management concerning the availability of information to the public under the Freedom of Information Act, 5 U.S.C. § 552. Appendix C to Subchapter 7, "Guides for Responding to Labor Organization Requests for Names of Employees and Identifying Information," specifically states:

> Agencies should not comply with requests from labor organizations for lists of home addresses or home telephone numbers of employees. Official release of this information would be an unwarranted intrusion into an employee's personal privacy.

See also 5 C.F.R. Part 294, Subpart G—Official Personnel Folder (1984); FPM Letter 294-6, July 25,

1977. But see FPM Supplement 711-1, Instruction 18 (August 10, 1978); 45 FR 78415, 78417 (November 25, 1980); 47 FR 16489 (April 16, 1982); 49 FR 36954, 36956 (September 20, 1984) (information may be disclosed to officials of labor organizations when relevant and necessary to their duties of exclusive representation).

Union Difficulty in Contacting Grievants

There are about 130 grievances filed by the Union each month. The only instance reflected in the record where the Union has been unable to contact a bargaining unit employee concerning the processing of a grievance occurred in 1982. Steward Stephen Perry was representing employee Peter Hamlin. Perry testified that because he did not have Hamlin's home address he could not contact Hamlin at home and could not pursue Hamlin's grievance from the second to the third step within the contractual time frames. It is undisputed that the parties agreement provides for the extension of the time limits under the grievance procedure. Such extensions are common. Perry testified that he spoke with his chief steward, Richard Ian, concerning the possibility of requesting a waiver of the time limits in Hamlin's grievance, but Ian refused, saying he wanted to "stick strictly to the time limit" because the Respondent had extended the time limits so much "that he couldn't keep his schedule straight". As a result, no waiver was requested concerning the Hamlin grievance.

Circumstances Relating to Union Access to Employees

Portsmouth Naval Shipyard is situated on an island about 275 acres in size. There are two entrance

bridges. Employees enter by cars, buses, and vans or by foot over four sidewalks. There are parking areas inside and outside the shipyard.

There are close to 9,000 employees working at the shipyard, about 5,500 of whom are in the bargaining unit of the Charging Party. Approximately 2,500 bargaining unit members are members of the Union on dues deduction. The record does not reflect the number of bargaining unit employees, if any, who are members of the Union but are not on dues deduction. Employees work three shifts. Most of the bargaining unit employees work in a controlled industrial area approximately 80 acres in size.

The Union uses the following means to communicate with bargaining unit employees:

a. List of bargaining unit employees. Pursuant to Article 35, Section 1 of the collective bargaining agreement, Respondent furnishes the Union semiannually an up-to-date list of all unit employees by name, job/position title, grade, check number, and type of appointment. The chief spokesman for the Union stated during negotiations for the agreement that the Union needed the job/position title and type of appointment information on employees so that the Union could solicit new members.

b. Bulletin boards. Under Article 35, Section 7 of the agreement, Respondent provides the Union at least one bulletin board or space on existing bulletin boards in each shop for posting notices concerning Union recreational and social activities, elections, and meetings. Other information can be posted only with Respondent's consent. Shipyard rules do not permit employees to view the bulletin board on work time; however, enforcement of this rule varies among the supervisors, and some supervisors do permit it.

c. New employees' orientation. By Article 5, Section 6 of the agreement, an appropriate Union representative is provided an opportunity to meet with all new employees in a shop or code to give them a brief outline of the Union's function.

d. Officers and stewards. Under the provisions of Article 7 of the agreement, the Union has three officers who spend 40 hours a week on official time. The Union also has 17 chief stewards and 55 stewards to perform representational functions. The ratio is one steward or chief steward for each 75 employees. The agreement provides that permission will be secured for an employee-steward visit and the purpose of the visit will be explained to the appropriate supervisor. This formal procedure is generally not followed except where there are personality problems between the steward and supervisor. A steward can generally approach an employee within his work area for a brief visit, such as to secure the correct address of a Union member, without special permission. Employees in the bargaining unit are distinguishable from non-unit employees, such as supervisors, by the color of the hard hats they are required to wear. A shop steward would be familiar with almost all of the employees in his work area even without the hard hats. Stewards do not receive official time for distribution of literature or for polling employees.

e. Handbilling. The Union on several occasions in the past has distributed material relating to important issues to bargaining unit employees by direct handbilling. Handbilling must be performed during non-duty hours. If it involved matters of a political nature, the handbilling has been done off the premises at the entrances while employees are coming to work. There is no way to distinguish unit employees from

the non-unit employees and supervisors among the approximately 9,000 employees of the shipyard unless some are personally recognized by the Union member doing the handbilling. The commotion of large numbers of employees coming to work and the three shifts make handbilling of all employees very difficult. Where the issues have strictly involved the shipyard, handbilling has been performed inside the shipyard by employees who are off-duty giving literature to employees who are also off-duty. In both cases, whether the handbilling was done outside or inside the shipyard, large quantities of the literature have been left at time clocks and lunch rooms where employees congregate.

f. Telephone. Union officers are able to use the telephones in the Union office to contact individual employees by telephone at their work locations. If the telephone extension is not known, it must be secured from the personnel office. It is difficult to contact employees working on a submarine or drydock. There may be two or three telephone extensions for the 200-400 employees working on a submarine and one telephone extension for those working in the drydock.

g. Union meetings. The Union and affiliated locals hold meetings once a month on varying dates. The Union may post notices of these meetings on bulletin boards. Non-members of the Union do not generally come to the meetings.

h. Internal mail system. The Union has used the internal mail system to send documents or letters to management offices concerning representational matters and to individual employees concerning their grievances. There is no evidence that it is an established practice for the Union to use the internal mail system for mass mailings to all employees.

i. Direct mail. The Union has in its possession the names and addresses of all of its members. These are obtained from application forms and dues deduction forms. In the past the Union and Locals have occasionally used the lists to send out newsletters to members' homes during election campaigns or to request feedback for contract proposals.[2] Ten years ago an insurance company was authorized to use the mailing list on at least one occasion in an attempt to sell insurance to Union members. Following complaints from members, additional requests from the same company were turned down.

The information concerning Union members, including their names, addresses, and other information, is maintained by the Union in the form of address cards which are physically located in open trays on top of file cabinets in the Union office. The address cards are not secured and are accessible to anyone who has access to the Union office. The names and addresses of Union members have also recently been added to a computer which will automatically affix gummed address labels to the proposed monthly newsleter. The Union wants to add to this computer file the home addresses of all unit employees who are not Union members so that they too may receive the newsletter.

Discussion, Conclusion, and Recommendations

The issue for determination is whether Respondent violated section 7116(a)(1), (5), and (8) of the

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[2] The former recording secretary of the Union testified without contradiction that the Union solicited comments concerning contract proposals from Union members, but that he was unaware of any formal solicitation of comments from non-members; further, the collective bargaining agreement is subject to ratification only by Union members.

Statute by refusing to provide the Union with the home addresses of bargaining unit employees. The General Counsel claims that (1) the home addresses are presumptively relevant and necessary information; (2) the Union, in any event, demonstrated that the information requested was necessary and relevant; (3) the names and home addresses are disclosable under the Statute notwithstanding the Privacy Act or Federal Personnel Manual; (4) there is no obligation for an exclusive representative to prove that it was not feasible to reach bargaining unit employees through alternative means; and (5), to the extent relevant, all alternative means of access are insufficient.

Respondent defends on the basis that (1) the information requested is not relevant and necessary under section 7114(b)(4) of the Statute; (2) the Charging Party has other adequate means of communicating with bargaining unit employees; and (3) Respondent is prohibited by law from releasing employees' home addresses.

As pertinent here, section 7114(b)(4)[3] of the Statute requires an agency, upon request, to furnish an

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[3] Section 7114(b)(4) provides that the "duty of an agency and an exclusive representative to negotiate in good faith shall include the obligation—

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and

exclusive representative with data which is "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." It is well established that under section 7114(b)(4) of the Statute a union is entitled to receive information necessary to the performance of its representational responsibilities, including negotiations, administration of the collective bargaining agreement, and the effective evaluation and processing of grievances.

An exclusive representative is responsible for representing the interests of all employees in the unit (section 7114(a)(1)) and must have effective means of communicating with them. Here the Union is seeking the home addresses of all employees in the unit in order to contact employees with active grievances and to send all unit employees a monthly newsletter. The publication of a newsletter is a common means used by organizations to present information, reports, analyses and forecasts to members or other special audiences. Newsletters are also often used to seek responses or other actions. Such a newsletter can be a very effective means of communication. Therefore, the home addresses of bargaining unit employees are relevant in this respect to the Union's carrying out of its representational obligations and "for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

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negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

However, since furnishing the home addresses of employees impinges to some degree on the personal privacy of employees, it is necessary to determine whether the Union has other effective means of communicating with the employees. Cf. *Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida*, 2 A/SLMR 214, affirmed FLRC No. 72A-50, 2 FLRC 106 (1974). I agree with the General Counsel that the other means available to the Union are ineffective for the intended purpose of sending newsletters to all unit employees.[4] Dissemination of a newsletter or its contents to all unit employees by means of bulletin boards, new employees' orientation, officers and stewards on non-duty time, handbilling on non-duty time, telephone, and union meetings would be a cumbersome, inefficient, and a hit or miss proposition in terms of reaching all unit employees. The record does not reflect that the internal mail system can be used for mass mailings to all employees. The use of the U.S. mails would be the most reliable means of reaching all unit employees with a newsletter. Therefore, the home addresses of employees are "necessary for full

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[4] With respect to the Union's alleged need for all home addresses in order to contact employees with active grievances, the Union officer and steward network at the shipyard should normally suffice to obtain the home addresses of employees with active grievances. This should be one of the first items of information obtained during the initial steward contact with a grievant. In those emergency situations where the information is not available to the Union and it is necessary for a steward to contact a grievant at home, it could be argued that the agency would be required to furnish the home address pursuant to section 7114(b)(4) for the effective processing of a grievance.

and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

Section 7114(b)(4) of the Statute requires an agency to furnish data only "to the extent not prohibited by law". The Freedom of Information Act, 5 U.S.C. § 552, as amended, provides that information in the possession of government agencies is available to the public except when the information is subject to one of the exemptions of the act. For example, personnel and similar files cannot be released where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)). Chapter 294 of the Federal Personnel Manual sets forth the instructions to all government agencies concerning the availability of information to the public under the Freedom of Information Act. Appendix C to Subchapter 7, "Guides for Responding to Labor Organization Requests for Names of Employees and Identifying Information," specifically states that agencies should not furnish labor organizations with employees' home addresses or telephone numbers since release of such information would constitute an "unwarranted intrusion into an employee's personal privacy". This instruction is labeled a "Guide" and must be treated as such. The Office of Personnel Management has otherwise recognized in publishing notices of its systems of records that a "routine use" of information in employee personnel records,[5] including home residences and mailing addresses, is disclosure "to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning

[5] The official personnel folder of each employee is under the jurisdiction and control of, and is part of the records of, the Office of Personnel Management, 5 C.F.R. § 293.303 (1984).

personnel policies, practices, and matters affecting working conditions." See FPM Supplement 711-1, Instruction 18 (August 10, 1978); 45 FR 78415, 78417 (November 25, 1980); 47 FR 16489 (April 16, 1982); 49 FR 36954, 36956 (September 20, 1984). Therefore, it is concluded that the disclosure of home addresses is not specifically prohibited by law or regulation.

Since, as noted, the furnishing of employee home addresses would impinge to some degree on the employee's rights to privacy, the needs of a labor organization for data to effectively represent the unit employees must be balanced against the employee's right to privacy. The furnishing by the Respondent to the Union of employee home addresses for representational purposes would not constitute an unwarranted intrusion on the privacy of such employees. The Union is not an unknown, outside organization to such employees. It has a lawful relationship to them. There is no evidence that the Union would make any improper use of the home addresses or, in light of the Union's previous bad experience with outside organizations using their mailing list some years ago, that such organizations would be given access to the addresses again. The daily personal mail of most persons brings a steady barrage of unsolicited flyers, advertisements, and solicitations. Employees may have to spend a moment or two deciding whether to read the Union's newsletter or to toss it out along with other unwanted mail. Considering the needs of the Union to effectively communicate with unit employees, any intrusion on employees' personal privacy caused by the furnishing of home addresses to the Union for representational purposes is minimal and not unwarranted.

Respondent's conduct in refusing to grant the Union's request for the addresses of unit employees constitutes a failure to comply with section 7114(b)(4) of the Statute in violation of sections 7116(a)(1) and (8) and a refusal to bargain in good faith with the Union in violation of sections 7116(a)(1) and (5) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

1. Cease and desist from:

(a) Refusing or failing to furnish upon request of the Federal Employees Metal Trades Council, AFL-CIO, the addresses of all unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, furnish to the Federal Employees Metal Trades Council, AFL-CIO, the names and addresses of all unit employees.

(b) Post at its facilities at the Portsmouth Naval Shipyard, copies of the attached Notice marked "Appendix" on forms to be furnished by

the Authority. Upon receipt of such forms, they shall be signed by the Commander, Portsmouth Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massachusetts, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

/s/ Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 25, 1985
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE
POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-
MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY
OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish upon request of the Federal Employees Metal Trades Council, AFL-CIO, the addresses of all unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Managment Relations Statute.

WE WILL, upon request, furnish to the Federal Employees Metal Trades Council, AFL-CIO, the names and addresses of all unit employees.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

APPENDIX F

24 FLRA No. 88

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-900

NATIONAL LABOR RELATIONS BOARD UNION, UNION

and

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
AND THE BOARD, AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. *Statement of the Case*

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal. We find this proposal to be negotiable.

II. *Background*

The Union in this case filed three unfair labor practice charges against the Agency. In the first

charge, filed concurrently with this appeal, the Union alleged that management had bargained in bad faith when it refused to negotiate over a proposal similar to the one under review here. The second and third charges, filed subsequent to this appeal, alleged that violations of section 7114(b)(4) of the Statute occurred when the Agency refused to furnish the names and addresses of employees in two units represented by the Union. In each instance, the Union elected to have the dispute processed under unfair labor practice procedures first.

In each case, the Authority's Regional Office declined to issue a complaint. The first charge was dismissed by the Regional Director because the dispute was not appropriate for processing under unfair labor practice procedures. The second and third complaints were dismissed by the Regional Director on the basis that the information sought was readily available from other sources, and, therefore, the Agency's refusal to provide home addresses did not violate the Statute. After the refusals to issue complaints were sustained on appeals to the General Counsel, the Union asked that we resume processing this negotiability appeal.

III. *Union Proposal*

> The Agency shall furnish the [Union] National President, the Washington District Vice President, and the Washington Local President, on an annual basis, a list of employees in the units to include: name; mailing address; position title; grade; Agency E.O.D.; and date of last promotion. The foregoing will be prepared as of De-

cember 31 each year and delivered by the end of February of each year.

A. *Positions of the Parties*

The Agency contends that disclosure of unit employees' home addresses is prohibited by law, specifically the Privacy Act of 1974. The Agency also points out that the Union has other "effective, expeditious ways" of communicating with the employees it represents. In light of this fact, the Agency contends that the "routine use" exception to the Privacy Act is inapplicable to this dispute.

While acknowledging that our decision in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 19 FLRA No. 21 (1985) involved a dispute nearly identical to the one in this case, the Union asserts that "the Authority, upon reconsideration, will reverse itself." In asserting this position, the Union contends that because employees actually have little privacy interest in their home addresses the Authority incorrectly denied the release of bargaining unit employees' names and addresses to the Union.

B. *Analysis and Conclusion*

Both parties agree that the question before us in this case is whether the release of bargaining unit employees' home addresses to the Union is a negotiable matter. They also concede that our decision in *Farmers Home Administration* governs the dispute here. In the original decision in that case, it was held that the disclosure of employees' names and home addresses was prohibited by the Privacy Act.[1]

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

The union in that case and the unions in other cases in which the *Farmers Home Administration* precedent was followed petitioned for court review of the Authority's decisions. In the course of litigation on appeal, it became apparent that the question of whether unions were entitled to unit employees' names and home addresses under the routine use exception of the Privacy Act, 5 U.S.C. § 552a(b)(3), had not been examined previously. Although that question had been raised before the Authority, it had not been addressed in the *Farmers Home Administration* decision. Consequently, remand was requested and granted in that case and two others presenting the same issue.

In our decision on remand, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (1986), we held that release of bargaining unit employees' names and home addresses to the union is not prohibited by law. In that decision we noted, among other things, that the Office of Personnel Management has defined one routine use of Federal employees' personnel records as disclosure of information they contain to officials of a certified representative when relevant and necessary to the union's representational responsibilities. Thus, we found that disclosure of names and home addresses was within the "routine use" exception to the Privacy Act. In reaching the conclusion that release of the information was within the duty to bargain, we also stated that "the mere existence of alternate means of communication is insufficient to justify a refusal to release the information." [2]

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[2] *Farmers Home Administration Finance Office, St. Louis, Missouri*, Decision and Order on Remand, 23 FLRA No. 101 (1986), slip op. at 9.

In our decision on remand we found that the union's written request for unit employees' names and home addresses did not have to be supported by an explanation of the reasons for the request, as is usually required by section 7114(b)(4) of the Statute. In making that finding we stated, at page 8 of the decision:

> In our view, an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union of its reasons for seeking the information.

Thus, we concluded that the release of names and home addresses of bargaining unit employees to the union is not prohibited by law, is necessary for the union to fulfill its duties under the Statute and meets the other requirements of section 7114(b)(4).

Based on our decision on remand in *Farmers Home Administration*, the disclosure of the type of information sought by the Union in this case is not barred by law and is, in fact, essentially related to a union's ongoing representational responsibilities. Consequently, the proposal in this case which also seeks release of unit employees' home addresses is negotiable. *See also National Federation of Federal Employees, Local 1655 and Adjutant General of Illinois*, 24 FLRA No. 1 (1986).

We also note that while section 7114(b)(4) obligates an agency to furnish an exclusive representa-

tive with information, to the extent not prohibited by law, necessary for the bargaining process, no provision of the Statute precludes the parties from negotiating contractual provisions requiring release of information which is otherwise not unlawful. *See National Treasury Employees Union and Department of Energy*, 22 FLRA No. 12 (1986).

IV. *Order*

The Agency must upon request (or as otherwise agreed to by the parties) bargain concerning the disputed Union Proposal.[3]

Issued, Washington, D.C. December 30, 1986.

/s/ J. Calhoun
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR RELATIONS AUTHORITY

[3] In finding the disputed proposal to be within the duty to bargain, we make no judgment on its merits.

APPENDIX G

23 FLRA No. 101

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 7-CA-30560 (19 FLRA No. 21)

FARMERS HOME ADMINISTRATION FINANCE OFFICE,
ST. LOUIS, MISSOURI, RESPONDENT

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3354, CHARGING PARTY

DECISION AND ORDER ON REMAND

I. *Statement of the Case*

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question before the Authority is whether it was an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home ad-

dresses of employees in a bargaining unit which the Union exclusively represents.

For the reasons which follow, we conclude that Respondent's refusal to provide the information violated the Statute, and we reverse the Authority's previous decision in this matter.

II. *Procedural Background*

In a previous decision in this case, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 19 FLRA No. 21 (1985), the Authority, relying on the decision of the United States Court of Appeals for the Fourth Circuit in *American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services*, 712 F.2d 931 (4th Cir. 1983), held that the release of home addresses was not required pursuant to section 7114 (b) (4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act.[1]

The Charging Party/Union in this case, and the unions involved in other cases in which the Authority followed the precedent established by this case, petitioned the courts for review of the Authority's decisions. In the course of the litigation that ensued, it became apparent that an issue raised before the Authority regarding the applicability of the Privacy Act had not been addressed by the Authority in rendering its decision in this case—namely, whether the union was entitled to the names and home addresses of unit employees under the routine use exception of the Privacy Act, 5 U.S.C. § 552a(b)(3). The Authority therefore sought remard of this case and three other

[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

substantially identical cases awaiting judicial review in order to reconsider its decisions and to address in the first instance the issue of whether disclosure of the names and home addresses of unit employees was or was not prohibited by law because of the applicability of the "routine use" exception of the Privacy Act, and such other issues arising under the Statute as might be appropriate. The remand requests were granted in this case, *American Federation of Government Employees, Local 3354 v. FLRA*, No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21), and in two others, *National Federation of Federal Employees, Local 1827 v. FLRA*, No. 85-2202 (8th Cir.) (reviewing 19 FLRA No. 85) and *Philadelphia Metal Trades Council v. FLRA*, No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107).

In contrast to the D.C. and Eighth Circuits, the United States Court of Appeals for the Second Circuit denied the Authority's remand request and issued a decision. In that decision the Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," *i.e.*, the Privacy Act, under section 7114(b)(4) of the Statute. *American Federation of Government Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2nd Cir. 1986). The Second Circuit applied the same balancing test used by the Authority. Contrary to the Authority and the Fourth Circuit, however, the court found that "the privacy interest of the average employee in his address is not particularly compelling." *Id.* at 556. Instead, the court noted Congress' determination that collective bargaining is in the public interest, and the court's prior holdings in private sector cases that the mere existence of alternative means of communication is not sufficient to justify the re-

fusal to release home addresses. The court also noted that it agreed with the Administrative Law Judge that the alternative means available to the union were inadequate, and that the other requirements of the Statute for release had been met. The court therefore remanded that case (19 FLRA No. 108) to the Authority to find a violation and require the Respondent to disclose unit employees' home addresses to the union. The court did not address the "routine use" issue.

In order to give full consideration to the issues raised as to the disclosure of names and home addresses to exclusive representatives in the instant case, and in other cases remanded by the D.C. and Eighth Circuits as well as other pending cases, the Authority issued a notice in the *Federal Register*, 51 Fed. Reg. 21,416 (1986), providing an opportunity for all interested agencies, labor organizations, and other interested persons to file *amicus* briefs dealing with these issues. The Authority has considered these submissions, as well as the entire record in this case, in reaching its decision. Although the parties in this case did not submit supplementary statements in response to the Federal Register notice, the American Federation of Government Employees did file an *amicus* brief outlining its position on the issues presented by these cases.

III. *Analytical Framework and Previous Decision*

As relevant to this case, section 7114(b)(4) of the Statute requires an agency to furnish to an exclusive representative, upon request and to the extent not prohibited by law, data which is (1) normally maintained by the agency in the regular course of business; and (2) reasonably available and necessary for

full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. In the previous decision in this case, the Authority held that the release of names and home addresses was not required pursuant to section 7114 (b)(4) because disclosure was "prohibited by law," specifically the Privacy Act.

The Privacy Act generally prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the information is required under the Freedom of Information Act (FOIA).[2] Exemption (b)(6) of the FOIA provides that information contained in personnel files (as well as medical and other similar files) may be withheld if disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy[.]"

Applying the balancing test developed by the Federal courts in cases concerning the (b)(6) exemption to the FOIA, the Authority weighed the public interest which would be served by providing the Union with names and home addresses against the employees' interests in maintaining their privacy. The Authority concluded that "the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes in the circumstances of this case." 19 FLRA No. 21 at 4. Since the information requested by the Union fell within the (b)(6) exemption, disclosure of the information was not required under the FOIA. Therefore, the Authority found that the requirements of the (b)(2) exception to the Privacy Act were not met and disclosure of the information was prohibited.

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[2] Freedom of Information Act, 5 U.S.C. § 552 (1982).

The Authority also found that the record established that the Union had "alternative means of . . . communication available." *Id.* Because of the finding that disclosure of the information was prohibited by law, the Authority did not address whether the Union's request met the other requirements of section 7114(b)(4).

IV. *Analysis of Remand*

Consistent with the requirements of section 7114 (b)(4), it is necessary to determine whether (1) disclosure of the names and home addresses of bargaining unit employees is prohibited by law, (2) the information is normally maintained by the Agency in the regular course of business, (3) the Union properly requested the information, and (4) the information is reasonably available and necessary within the meaning of that section. These issues will be addressed in turn.

A. *Prohibited by Law*

Provisions of the Privacy Act and the Freedom of Information Act are relevant to the determination of whether the disclosure of the information is prohibited by law. The Authority previously held that disclosure was prohibited by the Privacy Act. There are two exceptions to the Privacy Act's bar to disclosure which are applicable to this discussion: exception (b)(2) concerning the Freedom of Information Act, and exception (b)(3) relating to "routine use" of information.

1. *FOIA*

If the disclosure of the requested information is required by the FOIA, the Privacy Act's bar to dis-

closure is not applicable. 5 U.S.C. § 552a(b)(2). Under the FOIA, requested information must be disclosed unless it falls within one of the enumerated exemptions. The exemption pertinent to this case is exemption (b)(6) which authorizes withholding information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

In the previous decision in this case, the Authority balanced employees' privacy interests against the public interest in disclosure and found that the requested information fell within exemption (b)(6). In doing so, the Authority relied on the decision of the Court of Appeals for the Fourth Circuit in *AFGE Local 1923*, 712 F.2d 931. For the following reasons, we reverse our previous decision on this point and find that the requested information may not be withheld pursuant to exemption (b)(6).

It is necessary to balance competing interests to determine whether requested information falls within exemption (b)(6). It is also important to recognize, as emphasized in the *amicus* submissions filed by various labor organizations, that the FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Further, exemption (b)(6)'s limitation to "clearly unwarranted" disclosures instructs us to "tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971).

Consistent with this framework, we find that the balance favors disclosure of the names and home addresses sought by the Union. In section 7101 of the Statute Congress found that collective bargaining in

the Government is in the public interest and safeguards that interest. The disclosure of the information sought would enable the Union to identify the members of the bargaining unit which it is required to represent. Disclosure also would contribute to the Union's ability to communicate with its bargaining unit members and thereby enable it to better fulfill its responsibilities under the Statute. If employees are to exercise their statutory rights, they must be aware of the issues affecting them. By providing the Union with an efficient method of communication, disclosure of names and home addresses will facilitate the fullest exercise of employee rights.

On further consideration of this case, we also agree with the Court of Appeals for the Second Circuit that "the privacy interest of the average employee in his address is not particularly compelling." 786 F.2d at 556. For example, while *amicus* submissions by individuals indicate that some employees do not favor the release of their names and home addresses, many of the submissions also show that these employees already receive and often discard unsolicited mail. There is, of course, nothing to prevent these employees from handling communications from the Union in the same way, nor are employees prevented from requesting that they be deleted from the Union's mailing list. As noted by the Second Circuit, a union already has access to information such as salary levels that is more likely to implicate privacy concerns than the information sought here. *Id.*

On balance, we find that the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far out-weighs the privacy interests of individual employees in their names and home ad-

dresses. Disclosure of the requested information would not constitute a clearly unwarranted invasion of personal privacy and does not fall within the (b)(6) exemption to the FOIA. Since the information does not fall within the exemption, its disclosure is required under the FOIA and, under exception (b)(2) to the Privacy Act, its release is not prohibited by law.

2. *Routine Use*

Exception (b)(3) of the Privacy Act permits disclosure of information for a "routine use." Section (a)(7) of the Privacy Act defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it was collected." The Office of Personnel Management (OPM) publishes notices defining the routine uses of personnel records of Federal employees. One notice defines a routine use as the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation[.]" 49 Fed. Reg. 36,956 (1984). This standard is effectively the same as section 7114(b)(4)'s limitation of an agency's obligation to provide information to that which is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]"

As discussed below, we conclude that the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations. Consistent with that conclusion, we find that disclosure of the information sought here falls within the routine use established by OPM, and its disclosure is there-

fore a routine use under exception (b)(3) of the Privacy Act. Therefore, even if the disclosure was not authorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3).

Release of the requested information is therefore not prohibited by law. It may be released pursuant to exceptions (b)(2) and (3) of the Privacy Act.

B. *Normally Maintained by the Agency*

The Administrative Law Judge found that the names and home addresses sought by the Union were maintained by the Respondent in Official Personnel Files (OPFs), a card index system, and a computer file. He concluded that the information was normally maintained in the regular course of business. We agree and find that the requested information is normally maintained by the Agency in the regular course of business within the meaning of section 7114 (b)(4) of the Statute.

We note that although OPM retains responsibility for OPFs, they are physically maintained by employing agencies. While agency *amici* question whether OPFs are the best source for current home addresses, the Department of Justice notes in its *amicus* submission that there is "no question that the home addresses of federal employees . . . are in their personnel files."

C. *Union Request*

The Union requested in writing the names and home addresses of bargaining unit employees to enable it to prepare for contract negotiations. Although not raised in this case, some *amicus* submissions questioned whether a request must be tied to a

specific issue about which the union needs to communicate with its bargaining unit members.

As discussed throughout this decision, a union's statutory obligations involve a broad range of representational activities. We find that the statutory requirement concerning sufficiency of a request under section 7114(b)(4) is satisfied for requests such as that involved here when a general written request for the information is made. A precise explication of the reasons for the request involved here is not necessary. The requirement for a request was met in this case.

Our conclusion that a written request for names and home addresses need not contain an explanation of the reason for the request is consistent with previous decisions where we held that an agency's duty to furnish other information under section 7114(b)(4) of the Statute turns on the nature of the request and the circumstances of each case. *For example, Deparment of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region*, 21 FLRA No. 35 (1986). In our view, an exclusive representative's need for the names and home addresses of the bargining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union of its reasons for seeking the information.

D. *Reasonably Available and Necessary*

As discussed previously in connection with the statutory requirement that the requested information

be normally maintained by the agency, the names and home addresses of bargaining unit employees are contained in OPFs and, in this case, the ALJ found that the information was also available through an index system and a computer file. The information is reasonably available within the meaning of section 7114 (b) (4).

As for whether the information is necessary for unions to discharge their responsibilities under the Statute, the *amicus* submissions show disagreement among the parties. Generally, unions argued that the disclosure of names and home addresses is necessary for them to meet their statutory obligations. Agencies contended that these obligations could be fulfilled without disclosure of the information, through effective alternative means of communication.

Section 7114(a) (1) of the Statute provides that an exclusive representative is responsible for representing the "interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." Under this provision, a union's statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them.

Consistent with the *amicus* submissions of many agencies, the ALJ in this case found that the disclosure of names and home addresses was unnecessary because other means of communication, such as desk drops, direct distributions, meetings, bulletin boards, and direct personal contacts were available to the Union and provided adequate means of communication. We disagree. The disclosure of names and home addresses will enable the Union to com-

municate effectively and efficiently, through direct mailings to individual employees. The information is readily available within Agency files and its disclosure will enhance the exercise of employee rights as well as the communication process between employees and the Union.

We will not review the adequacy of alternative methods of communication on a case-by-case basis. Consistent with the view of the Court of Appeals for the Second Circuit discussed above, we find that the mere existence of alternative means of communication is insufficient to justify a refusal to release the information. Further, we find that it is not necessary for us to examine the adequacy of alternative means in cases involving requests for names and home addresses because the communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses information is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. We find that the names and home addresses of unit employes are necessary and should be provided whether or not alternative means of communication are available.

Our decision that names and home addresses information should be released is consistent with private sector precedent.[3] The National Labor Relations Board has held that names and addresses of unit employees are "presumptively relevant to [a] [u]nion's role as bargaining agent either during contract negotiations or during the term of an agreement." *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978).[4] The Board has not treated the presumption

---

[3] The National Labor Relations Act (NLRA) does not contain a provision equivalent to section 7114(b)(4) of the Statute. Rather, union's rights to receive information are an outgrowth of the obligation to bargain in good faith under section 8(a)(5) of the NLRA. For a discussion of the private sector obligation *see NLRB v. Acme Industrial Company*, 385 U.S. 432 (1967). *See also Prudential Insurance Co. v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969), where the court rejected the company's arguments that providing names and home addresses was unnecessary because adequate alternative means of communication (bulletin boards, grievance committees, hand distributions, and union meetings) were available to the union. As for the relevance of the information, the court stated "[i]t seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts." *Id.* at 84.

[4] *See also Armstrong World Industries, Inc.*, 254 NLRB 1239, 1244 (1981), where the Administrative Law Judge, whose decision was adopted by the Board, cited the Board's previous decision in *Autoprod, Inc.*, 223 NLRB 773 (1973), and stated that the *Autoprod* decision "appears to state flatly that a union is entitled to the addresses of unit employees, whether or not those addresses could be obtained by other means and, *a fortiori*, whether or not the union might be able to disseminate information to unit employees by other means than mailing." This statement also appears in the ALJ's decision in *Harco Laboratories, Inc.*, 271 NLRB 1397, 1398 (1984), which was also adopted by the Board.

favoring the disclosure of names and home addresses as an irrebuttable one. Disclosure need not be made in situations where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in imminent danger if the union knew where they lived. *See, for example, Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972). There is no such contention in this case.

V. *Conclusion*

We have considered the entire record in this case as well as the *amicus* submissions filed in response to our notice in the *Federal Register*. We conclude that the release of names and home addresses to the Union is not prohibited by law, is necessary for the Union to fulfill its duties under the Statute, and meets the other requirements of section 7114(b)(4).

Respondent was required to furnish the names and home addresses requested by the Union without regard to whether alternative means of communication were available or adequate. Respondent's refusal to furnish the requested information violated section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Farmers Home Administration Finance Office, St. Louis, Missouri shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees,

AFL-CIO, Local 3354, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of its employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 3354 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Farmers Home Administration Finance Office, St. Louis, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Re-

gional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 31, 1986.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN
Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III
Member

/s/ Jean McKee
JEAN MCKEE
Member

FEDERAL LABOR
RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE
POLICIES OF CHAPTER 71 OF TITLE 5
OF THE UNITED STATES CODE
FEDERAL SERVICE
LABOR-MANAGEMENT RELATIONS
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.
WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.
WE WILL, upon request by the American Federation of Government Employes, AFL-CIO, Local 3354, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

APPENDIX H

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, AS AMENDED, 5 U.S.C. §§ 7101-7135 (1988); AND RELEVANT PORTIONS OF THE FREEDOM OF INFORMATION ACT, 5 5 U.S.C. 552 (1988); AND THE PRIVACY ACT, 5 U.S.C. 552a (1988)

5 U.S.C. § 7101 provides:

"§ 7101. **Findings and purpose**

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the

Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirements of an effective and efficient Government.

* * * * *

5 U.S.C. 7102 provides:

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

* * * * *

5 U.S.C. 7103(a)(12) provides:

"§ 7103. Definitions; application

"(a) For the purpose of this chapter—

* * * * *

"(12) 'collective bargaining' means the performance of the mutual obligation of the repre-

sentative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

5 U.S.C. 7105(a) provides:

"§ 7105. Powers and duties of the Authority

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

* * * * *

5 U.S.C. 7111(a) provides:

"§ 7111. Exclusive recognition of labor organizations

"(a) An agency shall accord exclusive recognition to a labor organiztaion if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

* * * * *

5 U.S.C. 7114(a)-(b) provides:

"§ 7114. **Representation rights and duties**

"(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * * *

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

* * * * *

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

* * * * *

5 U.S.C. 7116(a) provides:

"§ 7116. **Unfair labor practices**

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

"(8) to otherwise fail or to comply with any provision of this chapter.

* * * * *

5 U.S.C. 7117 provides:

"§ 7117. **Duty to bargain in good faith; compelling need; duty to consult**

"(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

"(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

"(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

"(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsec-

tion, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulation does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c)(1) Except in any case to which subsection (b) of this section applies, if any agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exculsive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the

agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

* * * * *

5 U.S.C. 7121(a) provides:

"§ 7121. Grievance procedures

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as

provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

* * * * *

5 U.S.C. 7123(a)-(b) provides:

"§ 7123. **Judicial review; enforcement**

"(a) Any person agrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appears in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

* * * * *

5 U.S.C. 552(a)-(b) provides:

§ 552. **Public information; agency rules, opinions, orders, records, and proceedings**

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosections, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * * * *

§ 522a. Records maintained on individuals

* * * * *

(b) **Conditions of disclosure.**—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

* * * * *

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

* * * * *

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Nos. 89-444, 89-566, and 89-853

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals correctly concluded that federal agencies need not provide the home addresses of employees to their collective bargaining agent because such disclosure intrudes on employees' interest in privacy and does not significantly advance the purposes of the Freedom of Information Act.

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UNITED STATES DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a)[1] is reported at 884 F.2d 1446. The four opinions of the

[1] All Pet. App. references are to the appendix in No. 89-853.

Federal Labor Relations Authority (Pet. App. 38a-91a) are reported at 25 F.L.R.A. 828, 25 F.L.R.A. 560, 24 F.L.R.A. 917, and 24 F.L.R.A. 209.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1989. The petitions for a writ of certiorari were filed on September 14, 1989, October 31, 1989, and November 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Resolution of the question presented—whether federal agencies are required to provide the home addresses of employees in a bargaining unit to the union that represents the unit—requires consideration of three federal statutes. Title VII of the Civil Service Reform Act of 1978 (CSRA), also known as the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, governs collective bargaining in the federal sector. The statute generally provides that a federal agency must provide information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" to the authorized representative of its employees. 5 U.S.C. 7114(b)(4). However, Section 7114(b)(4) requires disclosure only "to the extent not prohibited by law." The Privacy Act of 1974, 5 U.S.C. 552a, is therefore relevant to a request for employees' home addresses, because one of its provisions (5 U.S.C. 552a(b)) "generally prohibits disclosure of personnel information." Pet. App. 10a. There is an exception to the Privacy Act (5 U.S.C. 552a(b)(2)) for information that must be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and therefore FOIA is also per-

tinent to the question presented. While generally requiring disclosure of information in agency files, FOIA excepts from disclosure information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Application of the exception in Section 552(b)(6) "requires a balancing of the harm to the individual whose privacy is breached against the public interest served by disclosure." Pet. App. 10a.

The Federal Labor Relations Authority (FLRA) first considered whether federal agencies must disclose home addresses to unions in *Farmers Home Administration Finance Office*, 19 F.L.R.A. 195 (1985). It held that "the employees' strong privacy interest in their home addresses" outweighed the public interest in disclosure since the union had adequate alternative methods of communicating with members of the bargaining unit. *Id.* at 198. The Second Circuit disagreed with that determination. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (1986). The FLRA then changed its position. It concluded that the "public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses." *Farmers Home Administration Finance Office*, 23 F.L.R.A. 788, 793 (1986).

Three courts of appeals upheld the Authority's revised conclusion and enforced orders requiring federal agencies to disclose the names and addresses of employees. *United States Department of Navy* v. *FLRA*, 840 F.2d 1131 (3d Cir.), cert. dismissed, 109 S. Ct. 632 (1988); *United States Department of the Air Force* v. *FLRA*, 838 F.2d 229 (7th Cir.), cert. dismissed, 109 S. Ct. 632 (1988); and *United States Department of Health and Human Services* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), cert. dismissed,

109 S. Ct. 632 (1988). The Eighth Circuit rejected the FLRA's position in part, holding that at least some employees have a sufficient privacy interest in their home addresses such that release would constitute a clearly unwarranted invasion of personal privacy. *United States Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989).

2. The decision of the court of appeals in this case arose out of four cases decided by the FLRA. In three of the cases, a union filed an unfair labor practice charge after a federal agency refused to provide the home addresses of employees in a bargaining unit the union represented. The fourth case arose after a union proposed that the agency agree to provide addresses and the agency refused to negotiate over the proposal. In each of the four cases the FLRA concluded, without deciding whether the union had adequate alternative means of communicating with members of the bargaining unit, that the agency was required to disclose the addresses. Pet. App. 38a-91a.

The court of appeals reversed. Pet. App. 1a-36a. In balancing the privacy interest of the employees against the public interest in disclosure, the court first noted that "entrepreneurs have filed FOIA requests for specific names of classes of current government employees in order to aid them in business solicitation." Pet. App. 13a. It concluded that federal employees have a privacy interest in avoiding an " 'unwanted barrage of mailings and personal solicitations' " from such persons. *Ibid.* (quoting *National Association of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989), and *Minnis* v. *United States Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985)).

The court of appeals further concluded that any interest in disclosure was minimal because the purposes of FOIA—

which "focuses on the citizens' right to be informed about 'what their government is up to' " (*United States Department of Justice* v. *Reporters Committee for Freedom of the Press,* 109 S. Ct. 1468, 1481 (1989))—would not be advanced appreciably by disclosing the home addresses of bargaining unit members. While the court hypothesized that an investigative reporter might use the home addresses of government employees "to ferret out what 'government is up to,' " it concluded that any public interest in the disclosure of employees' addresses was not "enough to outweigh the workers' significant interest in privacy." Pet. App. 13a, 14a.

In reaching its conclusion, the court below noted that each of the contrary decisions of the courts of appeals did not have the benefit of this Court's decision in *Reporters Committee* and "considered the *special* public interest in advancing collective bargaining as an aspect of the disclosure value, and, indeed, as the clinching value." Pet. App. 11a. That approach was erroneous in light of *Reporters Committee,* the court below stated, because in that case "the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—'to ensure that the *Government*'s activities be opened to [the] sharp eye of public scrutiny.' " Pet. App. 11a (quoting 109 S. Ct. at 1482).[2]

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[2] The court of appeals also held that the "routine use" exception to the Privacy Act (5 U.S.C. 552a(b)(3)) does not authorize disclosure. Under that exception—which authorizes the routine disclosure of information in personnel files where an agency has filed a notice in the Federal Register describing the sorts of routine disclosures that will be made (5 U.S.C. 552a(e)(4)(D))—the Office of Personnel Management (OPM) has concluded that agencies may disclose the addresses of bargaining unit members to unions, but only if the union shows that no adequate alternative means exist for contacting the employees. Pet. App. 18a-19a. The unions here had made no such showing. *Id.* at 22a.

ARGUMENT

1. The court of appeals correctly held that employees' privacy interest in their home addresses outweighs any relevant public interest in disclosure of that information. Many people do not want to be disturbed at home, and for that reason do not have a listing in a telephone directory and seek to have their names removed from mailing lists. See *National Association of Retired Federal Employees,* 879 F.2d at 875. Some people may fear that their safety would be endangered by publication of their home address. Accordingly, like the court below (Pet. App. 12a-13a), many courts have concluded that persons generally have a significant interest in protecting their addresses from disclosure. See, *e.g., National Association of Retired Federal Employees,* 879 F.2d at 876; *Minnis,* 737 F.2d at 787; *Heights Community Congress* v. *Veterans Administration,* 732 F.2d 526, 529 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *Wine Hobby USA, Inc.* v. *IRS,* 502 F.2d 133, 136-137 (3d Cir. 1974).

To determine whether information should be disclosed, the privacy interest involved must be weighed against the public interest in disclosure. In *Reporters Committee,* this Court held that the public interest inquiry "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." ' " 109 S. Ct. at 1481 (quoting *Department of the Air Force* v.

While two of the three petitioners mention the court of appeals' holding with respect to this issue in footnotes (89-853 Pet. 27 n.17; 89-566 Pet. 18 n.21), none of the petitioners has asked this Court to review the routine use issue. In any event, that question does not warrant review by this Court since the court of appeals correctly concluded that OPM's regulation is reasonable and there is no conflict in the courts of appeals on that point.

Rose, 425 U.S. 352, 372 (1976)). So limited, there is no real interest in disclosure of employees' addresses, since they tell nothing about what an agency is doing. At most, the disclosure of home addresses could marginally aid someone in learning about an agencies' actions, as the court of appeals stated. Pet. App. 13a. But addresses themselves are not the sort of information FOIA was enacted to make public, and the court of appeals therefore properly held that any interest in disclosure is outweighed by the privacy interest in preventing such disclosure.[3]

Petitioners primarily contend that the court below erred by failing to consider the interest, reflected in Title VII of the CSRA (specifically Section 7114(b)(4)), in providing information to collective bargaining agents. Indeed, that interest—and not any interest in opening government agencies to public scrutiny—was the sole basis for the FLRA's decisions requiring disclosure of employees' addresses. Petitioners' contention is contrary to the holding in *Reporters Committee,* since that case makes clear that the public interest inquiry turns on the relationship of the requested document to the basic purpose of FOIA, and disclosure of employees' addresses to a union does nothing to open an agency to public scrutiny. 109 S. Ct. at 1481.

Judge Ginsburg, who was not pleased by the conclusion, recognized that the advancement of collective bar-

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[3] The FLRA does not dispute that employees have a privacy interest in their addresses—it could hardly do so since it concluded that employees have a "strong privacy interest" in their addresses in its first *Farmers Home Administration Finance Office* decision (19 F.L.R.A. at 198)—but relies on cases holding that the interest is minimal. Pet. 25. While we disagree that employees' privacy interest in protecting their addresses from disclosure is not substantial, even a minimal privacy interest outweighs the relevant disclosure interest in this case because that interest is almost non-existent. See *Local 3, IBEW* v. *NLRB,* 845 F.2d 1177, 1181 (2d Cir. 1988).

gaining may not be taken into account in determining whether addresses should be released to federal sector unions. As she correctly explained in her concurring opinion, "[t]he broad cross-reference in 5 U.S.C. 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act * * *. Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." Pet. App. 24a.[4]

Moreover, even if the union's special interest in obtaining employees' addresses could properly be considered, that interest is hardly weighty. Under OPM's "routine use" regulation (see note 2, *supra*), a union may obtain home addresses where there is no adequate alternative method for it to contact employees. Thus, the special interest that would be relevant here is whatever interest a union with other adequate means of contacting employees has in obtaining their home addresses.[5] And if special interests are

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[4] Judge Ginsburg complained (Pet. 26a-27a) that private sector unions are able to obtain addresses from employers. But public employees are treated differently than private employees in many respects. For example, they are not allowed to strike (5 U.S.C. 7116(b)(7)) and most cannot bargain about wages, which are set by Congress (see 5 U.S.C. 7102(2), 7103(14)). Public employees also enjoy protections—notably those provided by the Bill of Rights—that do not restrict private sector employers. Among those protections is coverage under the Privacy Act, which applies only to public agencies and generally prohibits the distribution of personnel information.

[5] The records before the FLRA showed that the unions had adequate alternative means of contacting employees. In the case of the Social Security Administration, for example, the Union was permitted to use specified bulletin boards; to distribute literature "desk-to-desk";

to be considered, it should be recognized that a union with adequate means of contacting employees will fail to have the home addresses only of those employees who refuse to provide them to the union, presumably because they do not wish to be contacted by the union at home. The claims of those employees to the enjoyment of home and hearth undisturbed by unwanted union intrusions—the right to be left alone, at home if nowhere else—should be honored.[6]

2. Contrary to petitioners' contentions (89-853 Pet. 15-19; 89-566 Pet. 11-14; 89-444 Pet. 6), there is no conflict in the circuits that warrants consideration by this Court. Each of the allegedly contradictory court of appeals decisions predates this Court's decision in *Reporters Committee*. This Court's decision in that case made clear that, where an exception to FOIA's general rule that agency records must be disclosed is applicable, the factors weighing against disclosure must be balanced against the central purpose of FOIA, which is ensuring that "the *Government*'s activities be opened to the sharp eye of

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to hold meetings on off-duty time; to distribute its newsletter four times a year; to use the agency's internal mail system; to use the agency's telephone system; and to be present at new employee orientations. C.A. App. 118; see also Pet. App. 45a-46a, 71a-72a.

[6] Contrary to Judge Ginsburg's suggestion (Pet. App. 28a-29a), neither the Court's decision in *Reporters Committee* nor its application to this case is contrary to the Court's decision in *United States Department of Justice* v. *Tax Analysts*, 109 S. Ct. 2841 (1989). The Court held in *Tax Analysts* that documents in the control of an agency, such as the judicial decisions at issue in that case, are "agency records" under FOIA. Accordingly, an agency may withhold such documents "only if it proves that the documents fall within one of the nine disclosure exceptions set forth in 552(b)." 109 S. Ct. at 2845. In *Tax Analysts* no exception applied. Here, in contrast, the exception for personnel files "the disclosure of which would constitute a clearly

public scrutiny." 109 S. Ct. at 1482. The other courts of appeals should be given an opportunity to reconsider their prior decisions in light of *Reporters Committee.*[7]

Moreover, the FLRA itself should reconsider its prior decisions in light of *Reporters Committee* before this Court considers the matter. Its decisions in this case were all handed down prior to *Reporters Committee.* Thus far, the FLRA has issued no decision explaining how its position is sustainable if the special interest in collective bargaining is not included on the side of the scale favoring disclosure. On reconsideration, it may well change its position again and agree with the court below. In that event, the unions can challenge the decision in the various courts of appeals and attempt to create a conflict in the circuits. If a conflict emerges, review may be warranted, but it is not warranted now.[8]

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unwarranted invasion of personal privacy" *does* apply. The applicability of an exception cancels the statutory mandate of disclosure of agency records and requires consideration of whether disclosure would promote the purposes of FOIA.

[7] The FLRA notes (Pet. 16 n.12) that the Seventh Circuit in the *Air Force* case did not rely on the union's collective bargaining interest, but held that employees' home addresses are generally available under FOIA. That conclusion cannot endure after *Reporters Committee,* since the Seventh Circuit identified no purpose relating to "what the[ ] government is up to" (109 S. Ct. at 1481) that would be furthered by the disclosure of employees' addresses. It simply concluded that "[t]here are legitimate uses for home addresses; the Union proposes one such use." 838 F.2d at 233.

[8] The FLRA suggests (Pet. 17) that a conflict cannot emerge if it does not change its position because federal agencies may challenge any of its decisions in the District of Columbia Circuit under 5 U.S.C. 7123(a). However, the FLRA is authorized by 5 U.S.C. 7123(b) to enforce its orders in any appropriate court of appeals, which would include courts other than the D.C. Circuit in cases arising outside the District. We are aware of no authority preventing it from filing an enforcement action in another court of appeals as soon as it hands down an order.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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